TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. [illegible]

[illegible]

(21,694.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 228.

ALUMINUM COMPANY OF AMERICA, PLAINTIFF IN ERROR,

vs.

GEORGE H. RAMSEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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Caption.

eas and Proceedings Before W. H. Evans, Judge of the Saline Circuit Court, on the Tenth Day of March, A. D. One Thousand Nine Hundred and Eight.

No. 1138.

GEORGE H. RAMSEY, Plaintiff,
against
ALUMINUM COMPANY OF AMERICA, Defendant.

Suit for Damages for Personal Injury.

Saline Circuit Court.

GEORGE H. RAMSEY, Plaintiff,
vs.
ALUMINUM COMPANY OF AMERICA, Defendant.

Complaint at Law.

The defendant is a corporation organized under the laws of the tate of Pennsylvania as the Pittsburg Reduction Company and as lately changed its name to the Aluminum Company of America, nd is authorized to do business in the State of Arkansas and has esignated J. F. Loughborough of Little Rock, Arkansas, as its gent for service of process in Arkansas.

The Defendant company operated a mill at Bauxite in Saline ounty, Arkansas for the treatment of bauxite ore and operates n connection with said mill a railway running from points adja- ent where ore is mined, and is transported over said railway to De- endant's mill.

The Plaintiff has been employed by the Defendant company as ngineer of an engine operated by said company in hauling trains f ore from the mines to the mill over said line of railway. On une 18th, 1907 the defendant was operating said railway train, nd plaintiff was serving as engineer of the same in hauling ore rom the mines to the mill, and proceeding according to defendant's ustoms and instructions plaintiff approached the mill of defendant vith a train of loaded cars and plaintiff and defendant's servants nd agents in charge of said train proceeded to switch said loaded ars onto defendant's siding or switch running into the ore bin at aid mill. Before approaching said switch the defendant as was its ustom caused the engine to be uncoupled from the train, and ob- serving that the switchmen whose duty it was to open said switch were at their post of duty plaintiff proceeded with the engine ahead of said train of cars and passed the switch, and rely- ing upon said switchmen to open said switch and allow said

cars to proceed upon said siding the plaintiff, as was his duty, stopped said engine and dismounted from the cab or place of operation of the same and proceeded to clean out or renew the fire of said engine, and while so engaged through the negligence and carelessness of defendant, its servants and agents, said train of cars was allowed to bump into said engine because of the negligence of said switchmen in not opening said switch, causing it to run over and mangle plaintiff's leg in such manner that said leg had to be amputated.

The plaintiff is a young man, twenty-one years of age, with no other occupation or means of livelihood, and is now maimed and crippled for life, and has suffered great mental and physical anguis-, pain and suffering, and continues so to *fuffer*, and is deprived of his means of livelihood and damaged in the sum of Forty Thousand Dollars, and alleges that said injuries were caused by the negligence and carelessness of defendant, its agents and servants, in not switching said cars and not operating said train with care, as alleged, and in not providing adequate means and facilities.

Wherefore plaintiff prays for judgment in the sum of Forty Thousand Dollars, with costs and all other proper relief.

MEHAFFY, WILLIAMS AND ARMISTEAD,
Att'ys for Plaintiff.

Endorsed: "Filed July 10th, 1907. W. M. Steed, Clerk."

4 *Summons Issued and Served.*

Summons issued July 10th, 1907. Summons served upon J. F. Loughborough, the authorized agent for service of the Aluminum Company of America, in Pulaski County, Arkansas, on July 17th, 1907.

5 In Saline Circuit Court.

No. 1138.

GEORGE H. RAMSEY
vs.
ALUMINUM COMPANY OF AMERICA.

Motion to Make More Specific.

Defendant says it has many employees at its plant and about its said tram-way, and that the allegations of plaintiff's complaint are not sufficiently definite and certain to apprise defendant in what respects plaintiff claims it was negligent, and that therefore it cannot prepare its defense herein until it is advised definitely as to plaintiff's claim in this respect.

It therefore prays that plaintiff be required to make his complaint more definite in the following particulars:

First. That he allege definitely what ones of defendant's agents and servants plaintiff claims were guilty of negligence and carelessness, causing the injury alleged in the complaint, and in what respect plaintiff claims said agents were negligent and careless, and what it is claimed was done or was not done by defendant's agents or servants that caused said cars not to be switched properly.

Second. In what respect plaintiff claims that defendant's train was not operated with care.

Third. In what respect defendant did not provide adequate means and facilities for the operation of said train in switching cars.

J. W. WESTBROOK,
ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys for Defendant.

Endorsed: "Filed Sept. 3rd, 1907. W. M. Steed, Clerk."

6 In Saline Circuit Court.

No. 1138.

GEORGE H. RAMSEY
vs.
ALUMINUM COMPANY OF AMERICA.

Answer.

Defendant denies that it has a railway running from points where bauxite is mined to defendant's mill, but says it is true that it has a mill tram-way at those points that is used for the purpose of hauling ore to its mill. Defendant denies that on the — day of June, 1907, it caused the engine on which plaintiff was engineer to be uncoupled from the train, and denies that plaintiff observed that the switchmen whose duty it was to open said switch were at their posts of duty, as alleged in the complaint, and denies that the plaintiff proceeded with said engine ahead of said train of cars to pass said switch and relying upon said switchmen to open said switch and allow said cars to proceed upon said siding, as alleged in the complaint. It denies that while plaintiff was engaged in cleaning out and renewing the fire in said engine that it, its servants or agents either negligently, carelessly or at all allowed the said train of cars to bump into said engine, causing it to run over and mangle plaintiff's leg in such a manner that said leg had to be amputated, as alleged in the complaint.

Defendant has no information as to plaintiff's age, and therefore denies that he is twenty-one years old, as alleged in the complaint, and denies that he has no other occupation or means of livelihood. Denies that he is deprived of his means of livelihood and damages in the sum of $40,000 or any other amount, and denies that said alleged injuries were caused by any negligence or carelessness of this defendant, its agents or servants in not switching said cars properly

and not operating said train with care, and not providing
7 adequate means and facilities for the careful operation of said train in switching cars, as alleged in the complaint.

Defendant says that any injuries which plaintiff received at the time and place mentioned in the complaint were due to his own carelessness and fault, and for which this defendant is not liable.

Wherefore defendant prays judgment herein.

J. W. WESTBROOK,
ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
For Defendant.

Endorsed: "Filed Sept. 5th, 1907. W. M. Steed, Clerk."

8 In the Saline Circuit Court.

G. H. RAMSEY, Plaintiff,
vs.
THE ALUMINUM COMPANY OF AMERICA, Defendant.

Demurrer to Answer.

Comes the plaintiff and demurs to the plea of contributory negligence set up in the answer of defendant and for cause says:

That said plea does not state the facts which constitutes the contributory negligence, and does not state facts sufficient to constitute a defense, and says further that said plea of contributory negligence as pleaded in the answer is not a statement of facts but a mere conclusion of law.

Wherefore, plaintiff prays that said plea be dismissed.

MEHAFFY, WILLIAMS & ARMISTEAD,
Att'ys for Plaintiff.

Endorsed: "Filed Sept. 10th, 1907. W. M. Steed, Clerk."

9 In Saline Circuit Court.

GEORGE H. RAMSEY
vs.
ALUMINUM COMPANY OF AMERICA.

Amended Answer.

Defendant denies that it has a railway running from points where bauxite is mined to defendant's mill, but says it is true that it has a mill tram-way at those points that is used for the purpose of hauling ore to its mill. Defendant denies that on the — day of June, 1907, it caused the engine on which plaintiff was engineer to be uncoupled from the train, and denies that plaintiff observed that the switchmen whose duty it was to open said switch were at their posts

of duty, as alleged in the complaint, and denies that the plaintiff proceeded with said engine ahead of said train of cars to pass said switch and relying upon said switchmen to open said switch and allow said cars to proceed upon said siding, as alleged in the complaint. It denies that while plaintiff was engaged in cleaning out and renewing the fire in said engine, that it, its servants or agents either negligently, carelessly or at all allowed said train of cars to bump into said engine, causing it to run over and mangle plaintiff's leg in such manner that said leg had to be amputated, as alleged in the complaint.

Defendant has no information as to plaintiff's age, and therefore denies that he is twenty-one years old, as alleged in the complaint, and denies that he has no other occupation or means of livelihood. Denies that he is deprived of his means of livelihood and damaged in the sum of $40,000 or any other amount. And denies that said alleged injury was caused by any negligence or carelessness of this defendant, its agents or servants in not switching said cars properly and not operating said train with care, and not providing
10 adequate means and facilities for the careful operation of said train in switching cars, as alleged in the complaint.

Defendant says that any injuries which plaintiff received at the time and place mentioned in the complaint were due to his own carelessness and fault in his management and operation of his engine and train of tram-cars and in his failure to keep a lookout for said cars, and for which this defendant is not liable.

2.

For further defense, defendant says, that the switchmen of whose conduct plaintiff complains in his complaint were fellow servants with him, and even had they been negligent and such negligence produced the injury complained of by plaintiff, this defendant is not liable therefor.

J. W. WESTBROOK,
ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
For Defendant.

Endorsed: "Filed Sept. 12" 1907. W. M. Steed, Clerk."

11 In the Saline Circuit Court.

GEORGE H. RAMSEY
vs.
ALUMINUM COMPANY OF AMERICA.

Amendment to Answer in Response to Motion that it be Made More Specific.

Comes the defendant, and in response to plaintiff's motion that it set forth specifically the plea of contributory negligence herein, says:

That the plaintiff's negligent acts contributed to cause the injury of which he complained herein, by reason of his failure to see that every thing was in proper readiness to make the flying switch which he proposes to make, and to wait until defendant's servants were in the proper place to assist him in making said switch if he desired them to assist him, and in his uncoupling the engine from the cars and leaving his position on his engine to do so, and in endeavoring to uncouple his engine and make the flying switch when there was no one present to throw the switch; and was guilty of negligence contributing to his injury in not stopping his engine and securing sufficient assistance to make the flying switch before embarking on such a dangerous undertaking; and was negligent in not keeping a lookout to ascertain that sufficient help was nearby to assist him in making the switch; and was negligent in uncoupling his engine from the cars; and was negligent in not ascertaining that the cars did not take the switch after his engine had passed it; and was negligent in not keeping a lookout for said cars; and was negligent in standing on the ground behind his engine for the purpose of firing it; and was negligent in standing upon or between the
12 rails of the track on which his engine was, and exposing himself to danger from the cars that were following his engine.

J. W. WESTBROOK,
ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
For Defendants.

Endorsed: "Filed Sept. 17", 1907. W. M. Steed, Clerk."

13 STATE OF ARKANSAS,
County of Saline:

Motions by Defendant.

Be it remembered, that at a Circuit Court begun and held in the Courthouse in the town of Benton, in the County of Saline and State of Arkansas, on Monday, September 2nd, A. D. 1907, the same being the first Monday in said month and the time and place appointed by law for holding a term of said Court, and there was present and presiding the Honorable W. H. Evans, Judge of the Seventh (7th) Judicial Circuit of Arkansas, of which Saline County forms a part, before whom the following proceedings were had, to-wit:

Ordered that Court be proclaimed open pursuant to law, which was accordingly done by L. A. Hockersmith, Sheriff of Saline County, Arkansas.

And on Tuesday, September 3rd, 1907, the same being an adjourned day of the September, 1907, term of said Court, the following, among other proceedings, were had to-wit:

No. 1138.

GEORGE H. RAMSEY, Plaintiff,
vs.
ALUMINUM COMPANY OF AMERICA, Defendant.

On this day comes the defendant by its attorney and files a motion to make the complaint herein more specific, motion conceded and complaint amended.

14 And on Thursday, September 5th, A. D. 1907, the same being an adjourned day of the September, 1907, term of said Court, the following, among other proceedings, were had, to-wit:

No. 1138.

GEORGE H. RAMSEY
vs.
ALUMINUM COMPANY OF AMERICA.

On this day comes the defendant by its Attorney J. W. Westbrook, Esqr., and files his answer to the complaint of the plaintiff herein.

And on Tuesday, September 10th, A. D. 1907, the same being an adjourned day of the September, 1907, term of said Court, the following, among other proceedings, were had, to-wit:

No. 1138.

GEORGE H. RAMSEY
v.
ALUMINUM COMPANY OF AMERICA.

On this day comes the defendant herein by its Attorneys and files a demurrer to the plea of contributory negligence contained in the Answer herein.

And on Thursday, September 12th, A. D. 1907, the same being an adjourned day of the September, 1907, term of said Court, the following, among other proceedings, were had, to-wit:

No. 1138.

GEORGE H. RAMSEY, Plaintiff,
vs.
ALUMINUM COMPANY OF AMERICA.

On this day comes the defendant herein by its Attorney and files its amended answer to the complaint of the plaintiff herein. Plaintiff renews his demurrer heretofore filed herein as to contributory negligence.

15 *Response to Motion.*

And on Tuesday, September 17th, A. D. 1907, the same being an adjourned day of the September, 1907, term of said Court, the following, among other proceedings, were had, to-wit:

No. 1138.

GEORGE H. RAMSEY, Plaintiff,
vs.
ALUMINUM COMPANY OF AMERICA, Defendant.

On this day come the parties to this cause by their respective Attorneys, and the defendant files herein its amendment to the answer heretofore filed in this cause; comes also the plaintiff and files his response to the motion of the defendant to make the complaint more specific.

And on Thursday, September 19th, A. D. 1907, the same being an adjourned day of the September, 1907, term of said Court, the following, among other proceedings, were had, to-wit:

No. 1138.

GEORGE H. RAMSEY, Plaintiff,
vs.
ALUMINUM COMPANY OF AMERICA, Defendant.

Continuance by Court.

On this day come the parties to this cause by their respective Attorneys and by consent of both parties this cause is continued until the next regular term of this Court and set down for trial on Thursday of the first week thereof.

It is therefore considered, ordered and adjudged by the court that this cause be and the same is hereby continued until the March 1908 term of this Court and set for trial on Thursday of the first week thereof.

16 In the Saline Circuit Court.

GEORGE H. RAMSEY, Plaintiff,
vs.
ALUMINUM COMPANY OF AMERICA, Defendant.

Motion for Continuance.

Comes the defendant and respectfully represents to the court that at the last term of this court when this case was called for trial

efendant announced ready for trial and had all of its witnesses resent and in attendance upon court. Among these witnesses was . S. McGloflin, who was an eye witness of the accident and was an mportant witness for defendant, and would testified as stated in xhibit "A". At this time he was a soldier in the United States Army and was stationed at Jefferson Barracks, Missouri, and had been given a furlough in order that he might attend the trial of his cause and appear as a witness. Since this time the said McGloflin has been removed from Jefferson Barracks and has been stationed in the service of the United States in the Philippine Islands, and although defendant has used all diligence to secure his attendance at this trial it has been unable to do so, nor has it had time to take his deposition for use at this trial. That the said witness informed defendant that he would notify it if he moved from Jefferson Barracks and would attend at the trial of this cause when needed, and his Commanding officer informed defendant that the witness would be granted a furlough to attend this trial when needed—affiant believes the statement of what said witness would testify to if present, herein narrated, to be true, and said witness is not absent by the consent, connivance or procurement of defendant. The witness sailed for San Francisco on Feb. 14, 1908, without notifying defendant of his intention to depart, as he had promised to do. About 3 weeks ago the defendant wrote his Commanding officer, advising him of the time set for the trial, and then first learned that the witness had left St. Louis. It further represents that at the last term of this court this cause was continued at the request of plaintiff over the objection of this defendant. It therefore prays that this cause be continued now, to the end that it may secure the attendance of the said witness McGloflin or his deposition, obtain the benefit of his testimony at this trial.

17

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
For Defendant.

I, J. F. Loughborough am attorney for defendant and swear that the statements in this motion are true.

J. F. LOUGHBOROUGH.

Subscribed and sworn to before me this 6th day of March 1908.

W. M. STEED,
Circuit Clerk.

Endorsed: "Filed March 6th, 1908. W. M. Steed, Clerk."

18 STATE OF ARKANSAS,
County of Saline:

Be it remembered, that at a Circuit Court begun and held at the Courthouse in the Town of Benton in the County of Saline and State of Arkansas, on Monday, March 2nd, A. D. 1908, the same

being the first Monday in said month and the time and place appointed by law for holding a term of said court, there was present and presiding the Honorable W. H. Evans, Judge of the Seventh Judicial Circuit of Arkansas, of which Saline County forms a part, before whom the following proceedings were had, to-wit:

Ordered that court be proclaimed open pursuant to law, which was accordingly done by L. A. Hockersmith, Sheriff of Saline County, Arkansas.

And on Friday, March 6th A. D. 1908, the same being an adjourned day of the March 1908 term of said court, the following, among other proceedings, were had, to-wit:

No. 1138.

GEORGE H. RAMSEY
vs.
ALUMINUM COMPANY OF AMERICA.

Motion for Continuance Withdrawn.

On this day comes the plaintiff in person and by his Attorney, T. M. Mehaffy, Esqr. and H. M. Armistead, Esq., comes the defendant by its Attorneys, Rose, Hemingway, Cantrell and Loughborough, Esqrs. and defendants files its motion for a continuance on account of the absence of S. S. McGloflin, and alleged the facts to which the said S. S. McGloflin would testify if present. Whereupon plaintiff admitted the said S. S. McGloflin would if present, testify as alleged in defendant's motion for a continuance. Whereupon said motion is by the defendant withdrawn.

Both parties announce ready for trial; Whereupon comes
19 eighteen of the regular panel of petit jurors, who were duly sworn as to their qualifications, and were found competent by the court to serve as trial jurors in this cause. The clerk of this court, by order of the court, furnishes a list of said eighteen jurors to the Attorneys on each side and said Attorneys after having struck three names from each of said lists, there remained the following twelve to serve as a trial jury in this cause, to-wit: Tom Orr, Tine Medlock, William Carter, J. E. Little, Walter Hogue, Alex Barnett, Frank Harris, George Dobbs, W. F. Greenway, M. T. Johnson, J. W. Henson, J. H. Kerr.

The taking of testimony is begun and there not being sufficient time to complete the trial on this date, the jury herein are permitted to separate under the strict injunctions of the court, until tomorrow morning at eight o'clock, at which time the further trial of this cause will be resumed.

And on Saturday, March 6th A. D. 1908, the same being an adjourned day of the March 1908 term of said court, the following among other proceedings, were had, to-wit:

No. 1138.

GEORGE H. RAMSEY
vs.
ALUMINUM COMPANY OF AMERICA.

Order of Court.

On this day come the parties to this cause in person and by their respective attorneys, comes also the jury heretofore empaneled herein, and the further trial of this cause is resumed. And it appearing that one of the material witnesses for the defense is absent on account of sickness in his family and cannot be here at this trial on this date, this cause is continued until Monday, March 9th, 1908, at nine o'clock A. M.

20 And on Monday, March 9th A. D. 1908, the same being an adjourned day of the regular March 1908 term of said court, the following, among other proceedings, were had, to-wit:

No. 1138.

GEORGE H. RAMSEY
vs.
ALUMINUM COMPANY OF AMERICA.

On this day comes the plaintiff in person and by his Attorneys, Mehaffy, Williams and Armistead, Esqrs., and the defendant, Aluminum Company of America, by its Attorneys, Rose, Hemingway, Cantrell & Loughborough, Esqrs. Comes also the jury heretofore empaneled herein, and the taking of testimony is resumed and concluded.

Part of the argument of counsel is heard and there not being sufficient time to complete the trial of this cause on this date, the jury herein are permitted to separate under the strict injunction of the court until tomorrow morning at 8 o'clock, at which time the further trial of this cause will be resumed.

And on Tuesday, March 10th A. D. 1908, the same being an adjourned day of the regular March 1908 term of said court, the following, among other proceedings, were had, to-wit:

No. 1138.

GEORGE H. RAMSEY
vs.
ALUMINUM COMPANY OF AMERICA.

Verdict.

Verdict for $20,320.00.

On this day comes the parties to this cause by their respective Attorneys, comes also the jury heretofore empaneled and the argu-

ment of counsel is concluded and the jury after receiving the instructions of the court, retire to consider of their verdict. And afterwards on the same day returned into open court the following verdict, to-wit: "We the jury find for the plaintiff and assess damages Twenty thousand and three hundred and twenty dollars $20,320.00. C. H. Medlock, Foreman."

21 It is therefore considered, ordered and adjudged by the court that the plaintiff, George H. Ramsey, do have and recover of and from the defendant, Aluminum Company of America, the sum of Twenty Thousand Three Hundred Twenty ($20,320.00) Dollars as his judgment herein and all cost in and about this cause expended, for which execution may issue.

On this same day the defendant, by its attorneys, file their motion for a new trial herein, which said motion was by the court overruled, to which ruling of the court in overruling said motion for a new trial, said defendant excepted and asked that their exceptions be noted of record, which is accordingly done. Defendant prays an appeal to the Supreme Court, which appeal is by the court granted and said defendant is given ninety (90) days from this date in which to prepare, tender and file its Bill of Exceptions.

22 In the Saline Circuit Court.

GEORGE H. RAMSEY
v.
ALUMINUM COMPANY OF AMERICA.

Motion for New Trial.

Comes the defendant and moves the court for a new trial herein and says:

1. The court erred in giving to the jury each of the instructions requested by plaintiff numbered 1, 2, 3, 4, 5.

2. The court erred in modifying defendant's request for instruction numbered 2 and erred in giving said instruction as modified.

3. The court erred in refusing to charge the jury as requested by the defendant in each of its instructions numbered 1, 4, 7, 8, 9, 10, 13, 14, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 and 38, and erred in refusing to give each of said instructions.

4. The verdict is excessive.

Wherefore defendant prays that it be granted a new trial herein.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH, *For Defendant.*

Endorsed: "Filed March 10th, 1908. W. M. Steed, Clerk."

23 In the Saline Circuit Court.

GEORGE H. RAMSEY
vs.
ALUMINUM COMPANY OF AMERICA.

Bill of Exceptions.

Be it remembered, That on the 6th day of March, 1908, it being a day of the March Term, 1908, of the Saline Circuit Court, on the trial of this cause in said court before W. H. Evans, Judge, presiding, and a jury duly empaneled and sworn, the following evidence, exceptions and instructions were duly presented at said trial as follows, to-wit:

The defendant asked for a continuance of this cause, on account of the absence of witness McGloflin and filed its motion therefor setting forth what said witness would testify if present. Said motion being as follows:

"In the Saline Circuit Court.

G. H. RAMSEY, Plaintiff,
vs.
ALUMINUM COMPANY OF AMERICA, Defendant.

Motion for Continuance.

Comes the defendant and respectfully represents to the court that at the last term of this court when this case was called for trial defendant announced ready for trial and had all of its witnesses present and in attendance upon court. Among these witnesses was S. S. McGloflin, who was an eye witness of the accident and was an important witness for defendant, and would testify as stated in Exhibit "A." At this time he was a soldier in the United
24 States Army and was station- at Jefferson Barracks, Missouri, and had been given a furlough in order that he might attend the trial of this cause and appear as a witness. Since this time the said McGloflin has been removed from Jefferson Barracks and has been stationed in the service of the United States in the Philippine Islands, and although defendant has used all diligence to secure his attendance at this trial it has been unable to do so, nor has it had time to take his deposition for use at this trial. That the said witness informed defendant that he would notify it if he moved from Jefferson Barracks and would attend at the trial of this cause when needed, and his Commanding officer informed defendant that the witness would be granted a furlough to attend this trial when needed—affiant believes the statement of what said witness would testify to if present, herein narrated, to be true, and said witness is not absent by the consent, connivance or procurement of defendant. The witness sailed for San Francisco on Feb. 14, 1908, without noti-

fying defendant of his intention to depart, as he had promised to do. About 3 weeks ago the defendant wrote his commanding officer, advising him of the time set for the trial, and then first learned that the witness had left St. Louis. It further represents that at the last term of this court this cause was continued at the request of plaintiff over the objection of this defendant. It therefore prays that this cause be continued now, to the end that it may secure the attendanc of the said witnesss McGloflin or his deposition, obtain the benefit of his testimony at this trial.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH, *For Defendant.*

I, J. F. Loughborough, am attorney for defendant and swear that the statements in this motion are true.

J. F. LOUGHBOROUGH.

Subscribed and sworn to before me this 6th day of March 1908.

W. M. STEED,
Circuit Clerk.

25 Plaintiff thereupon consented that *is* said witness was present he would testify as set forth in said motion.

The plaintiff, to sustain the issues in his behalf, introduced the following witnesses:

26 *Testimony of George H. Ramsey.*

GEORGE H. RAMSEY, being duly sworn, testified:

(By H. M. ARMISTEAD, Esq.:)

Q. You are the plaintiff in this action?
A. Yes.
Q. Where do you live?
A. At Shaw, Saline County.
Q. Where is that?
A. Seven miles from here.
Q. How old are you?
A. 22, last November.
Q. How long did you work for the defendant company at the time of the accident?
A. I commenced the 31st day of August, 1906, and worked until the 18th of June, 1907.
Q. In what work were you employed at the time of the accident?
A. Running an engine.
Q. How long had you been running the engine?
A. Ever since the 22nd of January, 1907.
Q. What sort of railroad track had this company at the mines at the time you were injured? Describe the track equipment.
A. It was al- right.
Q. Describe it. Tell what kind of track equipment it was.

A. A narrow gauge engine and brand-new road, in pretty good shape.

Q. How much track was there at that time?

A. There was at least three miles, but there wasn't over about two that we had fixed up to run over.

Q. Were you operating over two miles of track at that time?

A. Yes.

Q. You state it was a narrow gauge track?

A. Yes.

Q. What was its gauge?

27 A. I don't know about that.

Q. About what was its gauge?

A. I don't know. It might have been 3½ feet.

Q. It was a steam locomotive you were operating?

A. Yes.

Q. How many locomotives had they?

A. One at that time on that road.

Q. How many cars?

A. At least 80 or 100.

Q. What was the horse-power or boiler capacity of this engine?

A. I don't know. I never figured it. About 50 H. P.

Q. Describe the situation of the tracks at that time with reference to the mines and the plant, and the manner in which you moved trains over the tracks.

A. One ran out east at the time I got crippled, and the other ran northeast. In putting these cars in the shed, if we got the cars off of the northeast track, we kicked them in there, and if we got them off of the east track, we made a drop of them or a flying switch.

Q. Have you caused to be made, or have you made, a pencil map or plat of the trackage there and the surroundings?

A. Yes.

Q. In this that I hand you the paper showing the plat?

A. Yes; that is something near it.

Q. Who made that?

A. I did.

Q. Does that accurately describe the arrangement of the tracks and plant?

A. Yes; I think I went around there enough to have a pretty good idea of it. That's not all the switches there, but that was the one we were operating there that day. (Plat is attached and marked Exhibit "A" to bill of exceptions).

28 Q. Describe to the jury the situation of the tracks with reference to the points of the compass and the location of the ore bins and the mines.

A. The shed sets north and south. There was an old bridge down here. (Indicating.) You come in here from running east out here three-quarters of a mile from the Martin mill dam mine. You come in here through a big cut. (Indicating.) You had to make a drop of these cars in here. (Indicating.) We always took this switch in here. (Indicating.) There is a road crossing that comes across here. (Indicating.) I got down to this road crossing. I went down this. (Indicating.) After the cars are unloaded in the sheds, they

push them out there (indicating), by hand, and back out here, (indicating) a little down grade. There is another bridge there (indicating). About 18 feet off the ground. Back up here (indicating) is another mine we were running from. When you had an engine on this track, there was no "Y" or turn-table to turn around on. That is the way it (engine) was put on the track; it was always headed one way; standing on the track and headed towards the shed. Coming in on this line, with the engine headed towards the shed, you have the cars between you and the shed. All you had to do was to give them a little start, and they would go in. If you were running out here to the Martin mill bend or red ore mines over there, when you come down here to get the empties, you have to put those cars here or run them up here (indicating). It is uphill. You put the engine over on this (indicating) switch. All you had to do was to throw off the brakes and hold them down, and come down and get the engine behind them and shove them up.

Q. How long had you been hauling ore in from this Martin Mill dam mine at the end of this track marked "O" on the map?

A. We ran from different places, just like cutting timber. We had bends there to stop in. We ran out here (indicating), as a general rule, one week out of a month, and hauled ten trains from
29 out there a day. Right here (indicating) is a coal box; right here is where I took coal.

Q. Where is the switch?

A. Across there (indicating).

Q. Immediately opposite the coal bin?

A. Yes, across the track north of it.

Q. In order to make this flying switch, when you came in west from the Martin mill dam mine with your engine at the head of your train, you would uncouple or pull the pin before reaching the switch, and proceed with the engine on to this track which leads to the right?

A. Yes.

Q. The switch would then be open?

A. Always left open, when we went out the other way.

Q. How do you mean by "always left open?"

A. After we got the empties behind us, we could go out here (indicating)——

Q. (Interrupting.) Do you mean, it was always left opon so that the engine would take this curve?

A. Yes, always.

Q. Then, in order for the cars to go into the ore bin*ds*, it was necessary for the switch to be thrown?

A. Yes, and the engine went in there (indicating).

Q. What kind of switch stand had they there?

A. None at all.

Q. How was the switch thrown?

A. By a little lever. I expect you all saw them. They have them down there on the Hot Springs & Western.

Q. That lever lay flat?

A. Yes. A "jack rabbit" switch, I call it.

Q. That lever lay flat on the ground when the switch was either closed or open.

A. Yes, either way. It made no difference which way the switch was lined, it lay flat on the sill.

Q. You had worked at this business for about a month?

A. I had been running the engine over that switch ever since the nd of January, 1907, up to the 18th of June.

Q. Who were you working under?

A. Mr. Gibbons was the man who gave me the job.

Q. Was he your foreman?

A. He and Mr. Brazzel was about all I looked to.

Q. Who was Mr. Brazzel?

A. He was general manager.

Q. Did you have any foreman between you and Mr. Brazzel?

A. Our timekeeper. I was out there and just went when I got ady and came back when I got ready. I kinder had charge of it.

Q. Who put you to work there in this switching of these trains?

A. Mr. Gibbons.

Q. State whether or not you worked under Mr. Brazzel?

A Of course, he came around to see about it, a kind of general anager. I hardly ever saw Mr. Gibbons.

Q. Did you take orders from Mr. Brazzel?

A. Yes.

Q. State how those trains were handled and used by you and the ther employés in putting those ore cars into the bins.

A. When we went out here (indicating) we had a big cut to come hrough, something like a quarter of a mile we come through, when 're got about 75 yds. of the switch, and they had two men to come up ere (indicating) and cut these cars at the switch. They had not a hing to do but be there; didn't have to unload the cars down at the hed or anything else. As quick as they got them down there, they ame back. They should have done that. They should come to the witch. As a general thing, one would come up here and pull the pin. They would do it occasionally. And one would stay 31 at the *the* switch. This day the second trip was made out there. When I came down here (indicating), the boys were oth sitting on this coal box right here (indicating) when I come in ight. I could not see the switch. I had whistled. I always whistled when I came in sight. I could not see the switch. My brakeman was on the back end. He always rode on the back end coming in, on account of coming up a bad hill. The train broke in two sev- eral times, and finally I told him he had better stay back there. He used to come and ride in on the engine at first, but I told him to stay back there, for if it broke in two it would kill a man or two. And it did break several times.

(Mr. LOUGHBOROUGH:)

Q. You mean the coupling pin would?

A. Yes. The coupling or link pin. He was on the back end of the train. I saw these men and looked back at him on the back end. I looked at my pin. I didn't have any tender behind me. It was only built for one man. The water tank set up in front of

the cab, straddled of the boiler. You uncoupled your cars right behind the sill. Here is the back of the cab (indicating). You had your back there, of course, and uncoupled the cars right from the sill of the engine.

Q. How far from your stand? From your place of operation?

A. I could reach down and get it.

Q. How far away from you? How far in feet?

A. I could sit on the seat and reach down and pull the pin. I saw the brakeman on the back end, and looked down at my pin. If it was tight, you had to stop. I saw it was loose, and got down about 50 yards of this switch where I pulled the pin. The boys, before I pulled the pin, got up and walked up the track. When I got back upon my feet after pulling the pin and looked ahead, one of these boys, Sam McLaughlin, walked up the track there, I suppose about 10 steps away. Bob Page was standing at the switch.

I said, "you come out here next time and pull this pin. We
32 are in a hurry this morning". I said, "I don't want to pull the pin another time. I pulled it the last time." They said, "A-1 right," I rolled right down here to this road crossing and got it across and stepped off right behind it. The next place we went to was around up here to this mine. It was about here (indicating).

Q. You mean, the next place you were to go to?

A. Yes, I didn't never go there. I was to go around up there and go down here (indicating) and get the empties and go up there. It just simply took 150 lbs. of steam to go up there with a train. We were to go up here and shove the cars up there at first (indicating) put the train up there. They would unload, and carry the empties up there and set on this switch and drop back here (indicating) and we would get the empties and then shove them up there (indicating). We always had cars for them. We had two crews of cars, one to load while the other was going in loaded. Wherever we got down here and wanted to set those empties up, we had to have a hot fire. When I stopped down at this crossing coming in, I had 90 lbs. of steam when I looked at the gauge of the water. I looked in the fire box, and didn't have any fire. I grabbed the clinker hook, and turned around. The cars were about ten steps of this switch. Bob was standing there. This little lever, I never noticed it. I was in a hurry. I never noticed whether it was thrown or not. When I stepped down to start up the fire, just as I raised up after getting through, these cars ran into me, and knocked me down and up against the engine. It kinder turned me around facing the boys. I had started down the track; we were going down on this "empty" track a little ways. It was a powerful down-grade down here. It was about this switch here (indicating). When the cars hit me, they were moving, I guess, about seven miles an hour; probably eight, when it hit me down here. I thought sure I was gone then when it hit me and mashed me up. I got back and had hold of my brake and stopped it, and one of the boys, the brakeman on the back end, he got
33 down there about the time I got stopped, and moved the engine ahead, and let me up.

Q. At first the boys were standing here? (Indicating.)
A. Sam McLaughlin was four cars lengths back from the first car.
Q. When was that?
A. When the cars hit me.

(Mr. MEHAFFY:)

Q. After you were hurt?
A. Yes. It just kind of wheeled me around. He was four car lengths back. Bob Page was behind him; that man was standing at the switch.
Q. Standing at the switch when?
A. When I looked back and turned my back to him, he was standing at the switch.

(Mr. MEHAFFY:)

Q. That was at the time he should have been there to throw the switch?
A. Yes, while he was there.

(Mr. MEHAFFY:)

Q. That was his business, to throw the switch?
A. Yes. These cars never went two car lengths after he got on. I don't know how long Sam had been on back. He was four car lengths back.

(Mr. MEHAFFY:)

Q. At the time you went down there and pulled the pin so as to let the engine go on and the cars go on the other track, the person whose business it was to throw the switch so that the cars would change track, was right there at the switch?
A. Yes, standing with his foot on the sill.
Q. You thought he had done it?
A. Yes. After I passed, I stopped. I stopped and put on the injector and blower. They ran into me. When I looked back, two of them was standing there crying like babies. The brakeman come down and let me out, and dragged me off in the sand. I asked him what was the matter, that they let them cars come in there.

(Counsel for defendant objected to any statement made to him at the time, as not being a part of the *res gestæ*.)

34 (Mr. MEHAFFY:)

Q. Was that right at the time?
A. Yes.

(Mr. MEHAFFY:)

Q. Immediately after the accident?
A. Yes, it wasn't two minutes.
Q. How soon after you were hurt was it this happened?
A. It wasn't two minutes after I got hurt.

(Mr. MEHAFFY:)

Q. Where were you? Just gotten out there in the sand right at the place?

A. They had just dragged me off the track. I had gone about the length of the engine before I got stopped, and he dragged me to the road crossing.

(Mr. MEHAFFY:)

Q. Who was this conversation with? With one of the parties there at the switch?

A. Yes, one of the boys. I was talking to Page, the man standing at the switch.

(The conversation was not insisted on by counsel for plaintiff.)

Q. What became of you then?

A. They went over and got a cot and came there and got me and carried me to the doctor's office. Dr. Morris's office there, and Dr. Cheney. They were practicing medicine together. They went out about five miles in the country to see some man's wife, and they telephoned down here (Benton) to Dr. Gann. They all got up there I suppose about twelve o'clock, and went to work on me. This happened about 9:30 o'clock on the 18th of June, 1907, Tuesday morning. They wanted to know if I wanted them to cut the leg off, that they could not save it. I told them, of course, if they could not save it, to cut it off, but save it if they could. They chloroformed me. That's about all I knew then until the next morning.

Q. Where did they take you then?

A. After the doctors amputated the leg, they decided to send me to Little Rock to the hospital. That was the 18th of June. So, the 19th they sent me to Little Rock. I lay up there about ten
35 days, and liked to have died. I thought I was going to die. Finally, I got to where I could sit up, and got out of there in four weeks. I went down there on the 19th of June and got out of there on the 19th of July. I came down home and on the 29th of July I fell down, fell on the end of that leg. I could not get up. They got me up and carried me in the house and put me on the bed. I lay there nine days, and that leg "busted". I fell down on the 29th, and on the 6th day of August that leg "busted" and they sent me down to Little Rock again to the hospital, on the 7th. I lay there six weeks again before I got out. I got out the 20th of September. I have been well ever since.

Q. State so that the stenographers can get it in the record where your leg was cut off. Is it not cut off close to the hip?

A. About 5½ inches of the hip.

Q. It is your left leg?

A. Yes.

Q. If you suffered during the time you were injured and after that, tell the jury about it.

A. The second time I was up there and sent after the doctor, the doctor that waited on me, he come up and told me he would have to curet that leg. I didn't know what that meant. I asked him if it

would hurt. He said not much. He come up there and threw me on a table. He asked me if I wanted chloroform, and I said, "No, the other made me so sick I like to died." I never ate nothing for three days.

Q. That was the first time?

A. The second time I went up there, and they curetted the leg. I didn't know what that meant. He came up there any way, and he started to scrape the bone of that leg, and all that rotten flesh, about four inches of that bone. I knew what "curet" was after that. He will have to bring in four men to hold me whenever he *curates* that bone again. I suppose if he did it one time he scraped
36 that leg twenty times in that six weeks. You talk about hurting; it might near kills you.

Q. Who was the doctor there?

A. Dr. Zell, on 9th and Main.

Q. If you suffered pain from the time you were injured until the time your leg was amputated, describe to the jury.

A. They had no doctor there—they never like to have gotten a doctor—from 9:30 until nearly 12:00 o'clock, before they ever got a doctor. Al Chambers, who I was boarding with, came up and staid with me and fanned me; it was awful hot. I lay up there with that leg all busted to pieces and bleeding on the cot. You need not doubt but what that was hurting.

Q. Who amputated the leg?

A. Dr. Morris, Dr. Gann and Dr. Cheney.

Q. Who was the brakeman on this train at the time of your injury?

A. Forrest Raper.

Q. Where was he when you pulled the pin?

A. On the back end of the train.

Q. How many cars had you?

A. Ten cars.

Q. All loaded?

A. Yes.

Q. About what is the length of those cars?

A. Ten feet anyway, if not more.

Q. How many tons do they hold, each of them?

A. Mr. Sargent, the civil engineer, said they weighed——

Q. (Interrupting.) Do you know?

A. They will hold two tons.

Q. How far were you from the switch when you pulled the pin?

A. 50 yards.

Q. Are you approximating that?

A. Yes.

37 Q. How far from the switch were you when you blew the whistle for the switchmen?

A. I was 200 yards.

Q. Out of sight of the house?

A. Yes, I wasn't in sight.

Q. Were you in that cut then?

A. Yes; just going up in the cut.

Q. Did you look at the switch before you pulled the pin?
A. Yes, I could see it; it was in a straight line.
Q. Where were the switchmen then?
A. When I got in sight, they were sitting on the box, and got up and walked across.
Q. Did you know those men?
A. Yes.
Q. What were their names?
A. Bob Page and Sam McLaughlin.
Q. What were their duties there?
A. To throw that switch and ride those cars into the shed and stop them.
Q. Had they been in that capacity for the length of time you had been there or before this occasion?
A. Neither one of them had been there as long as I had been. Bob had been there about a month, and Sam McLaughlin was working in another man's place that day.
Q. How long had Sam been there?
A. That was his first day.
Q. You state that Sam McLaughlin walked up the track towards the approaching engine, and Page stayed at the switch?
A. Yes. Page was standing with his foot on the switch, and Sam McLaughlin met me about ten steps from the switch.
Q. After you pulled the pin, state whether or not you started your engine up rapidly?
38 A. Sure I did. I pulled her wide open for a little ways.
Q. That was in order to——
A. (Interrupting.) —to get ahead of them.
Q. How far were you from the cars, if you know, when your engine crossed the switch.
A. I would say I was 40 yards; something like that.
Q. They were rolling along behind you?
A. Yes.
Q. And Page was then at the switch?
A. Yes.
Q. Had Page switched the cars for you before?
A. Yes.
Q. He made this drop switch before?
A. Yes.
Q. Was there any way to switch those cars into the bins besides the use of that drop switch?
A. No.
Q. There was no siding provided?
A. No.
Q. And no "Y"?
A. No.
Q. State whether or not you had been told that day to hurry.
A. Yes. Mr. Brazzel was up there that morning. We were standing at this red ore mine. We had never run to but one place before, and that was out east on this Martin mill dam line. This time they put us running from two different places; from up here

dicating) and out here (indicating) also. We had made one from out there (indicating) and one from here (indicating) l that was the second one from out here (indicating) when I got ppled.

Q. You mean upon that morning?

A. Yes. While we were up here (indicating) Mr. Brazzel came up there.

Q. The stenographers cannot get it. What do you mean?

A. At this red ore mine; out northeast. As he passed ng, he said, "You don't want to stand around here, and let those lows we are paying 30 cents an hour to wait on a few men." We rried those cars out of there about half loaded. There were several en at the shed who had waited a long time to get those cars loaded t there.

Q. You had no fireman on the engine?

A. No.

Q. You operated the engine as fireman and engineer?

A. Yes.

Q. Was it necessary for you to rake that fire and clean the clink- s out in order to get up steam to move the engine up the grade you eak of?

A. Yes.

Q. Could you have done that work from some other position than at which you assumed at the time you were injured?

A. No.

Q. State why not?

A. You did not have enough room back of the boiler. The floor as two feet deep. From the end of the boiler there was two feet ck to where the car was coupled.

Q. Why not clean the fire from off that two feet?

A. You could not stand on that.

Q. You could stand on a platform two feet wide?

A. Yes, but you could not stand there at the fire box and do it.

Q. Why not?

A. It would burn you up, so close, for one thing. Then you uld not get the hook in there, it was down so close to the floor, the or was.

Q. If there is a reason why you could not, tell the jury.

A. You could have a clinker hook. To get in there with that clinker hook, you had to get down and run it in. You could never stand up there and take it out or put it in.

Q. Why not?

A. Because you could not take it out to save your life.

Q. You mean if you stayed there and put it in, it would get too ot for you to handle it?

A. Yes.

Q. Could you do that work from either side of the engine?

A. No.

Q. Why not?

A. Because you had to work into that door, if you worked on the re, and you had to be right in the middle of the track.

Q. You mean by that that there was no opening upon either side?
A. No.
Q. Had you ever pulled the pin before in coming into this switch?
A. Yes. I pulled it the trip before we come out there.
Q. Had you ever pulled it before when Bob Page was at the switch?
A. Yes. I pulled the pin for him and other men that had been there.
Q. Was there any reason why he could not have thrown the switch if you pulled the pin?
A. No.
Q. Was there any reason why he could not have thrown the switch if he did not ride the engine in?
A. No. That had nothing to do with throwing the switch.
Q. You stated that you did not notice whether or not that switch lever was thrown when you looked back. You could not see it.
A. I might have notice- it. I don't know whether it could.
Q. How large a thing was the lever? How long and how deep?
A. About as long as your arm, and about an inch thick and two inches wide.
41 Q. Whichever way the switch was thrown, it lay flat?
A. Yes.
Q. On the ground?
A. Yes, flat on the sill.
Q. How fast did the cars appear to be rolling when you looked back after you had stopped the engine?
A. About six miles an hour.
Q. Where was Page then?
A. Standing at the switch.
Q. Which way was he looking?
A. Towards the cars.
Q. Where was McLaughlin?
A. He was about 15 steps away, about meeting the first car.
Q. How far were the cars from the switch?
A. About 15 steps.
Q. How far away was your engine from the switch?
A. I was five or six car lengths.
Q. If that switch had been reversed or open, those cars, instead of coming on you, would have gone into the bins?
A. Yes, they would have gone into the shed.
Q. Was that what you expected them to do?
A. Yes. That's the way I thought they were going.
Q. Why did you think they would do that?
A. I never saw a man yet, when throwing a switch, that would not throw it as quick as the engine was off of it. He was a switchman. I relied upon him throwing it.
Q. When you passed Page at the switch, how far behind you were the cars, about?
A. 40 yards, when I went through the switch.
Q. Was there anything to prevent him from seeing that the engine was detached, or that the cars were approaching the switch?

A. Not a thing.
42 Q. How long did you say Page had been working there?
A. He had been on that job a month.
Q. Where is he now?
A. Down stairs.
Q. Where is he working now, if working at all?
A. He is working for the Aluminum Company out there, I understand.
Q. Do you know whether he has been working for them ever since the accident?
A. Not all the time, I don't think.
Q. What occupation have you in life other than this you were engaged in at the time of the accident?
A. I had always been helping my father farm. That what he followed. I just got out and worked for myself.
Q. How long had you been working in the railroad business?
A. I went to work for them on the 22nd of January, 1907.
Q. What were our earnings?
A. $2.40 a day.
Q. How often did you work? Did you work every week day?
A. Every day in the week.
Q. Where had you worked before you went there?
A. I switched some for the Hot Springs & Western once.
Q. Whereabouts?
A. Hot Springs.
Q. How long did you work for them?
A. I switched fifteen nights, I believe.
Q. Before that, what labor had you done, if any?
A. Nothing. I learned to run an engine before I ever got a job riding around with old friends I had.
Q. Have you any special education, more than a common school education?
A. No, not even that.
43 Q. How long did you go to school?
A. I never went to school over a year and a half.
Q. Where do you live?
A. Out here at Shaw.
Q. It is in the country, not in the city?
A. Yes.
Q. Can you follow your occupation of locomotive engineer with that one leg?
A. I am not going to.
Q. I didn't ask you that. I say can you do it?
A. No, not handy.
Q. What are your expenses, owing to your injury?
A. My doctor's bill in Little Rock was $206.00. My hospital bill was $180.22. I have the bills in my pocket. $386.22 was my expenses in Little Rock for the doctor's bills and hospital fees.
Q. Any other expenses?
A. Yes. The doctors that amputated my leg never did tell me

what they charged. I asked them a time or two, but they never would tell me.

Q. Any other expenses?

A. Of course, people came to see me; first one thing and another.

Q. Did you have to buy any medicines or drugs?

A. Clothes, a little.

Q. What do you mean by that? Were your clothes destroyed by the accident?

A. Yes and what I needed.

Q. Did you buy any drugs?

A. Not to amount to anything.

Cross-examination by J. F. LOUGHBOROUGH, ESQR.:

Q. You say you worked about a railroad before you went over to the tram-road?

44 A. Yes.

Q. You had a job switching in Hot Springs?

A. Yes.

Q. How long did you work there?

A. 15 nights.

Q. Switching at nights?

A. Yes.

Q. Where did you work on an engine before that?

A. I never worked. I rode around with old friends I had running engines, and would run the engine a heap just because they would let me.

Q. You had learned to run an engine?

A. Yes. That's the way I learned.

Q. It was one of those big railroad engines?

A. Yes.

Q. How many of you were there that had charge of this switching of these cars from the engine down to the shed? Who participated in that work?

A. Four.

Q. That consisted of you?

A. And the brakeman with the engine?

Q. And these two switchmen?

A. Yes. They came up after the cars.

Q. Who directed how that switching should be done, you or the brakeman on the train?

A. I knew how it had to be and he did. We never said nothing about that. I knew how it had to be done and so did he.

Q. What you stated about it went with the rest of them?

A. No; I would not control him; not a bit.

Q. I don't mean you would disagree with them, but you would tell how it should be done?

A. I knew how it had to be done.

45 Q. You controlled the engine?

A. Yes.

Q. You could take the cars along or stop them when you saw fit?

A. Yes.

Q. And you told them when to cut the cars aloose for that drop switch and start your speed up?

A. When the pin was fastened, of course they would have to get it mighty quick, and would tell them just as I would give them slack.

Q. In other words, you directed them when the flying switch was to be made?

A. Yes, when the man was to pull the pin that way. If I didn't pull the pin, if it was tight, I would always tell them.

Q. Coming from that Martin mill dam mine, you had your brakeman to come up from behind and pull the pin?

A. No.

Q. Didn't you have Bremmert, when you would get up in the cut, to leave the rear end of the train and come up there and pull the pin for you?

A. No. That was Charley Bremmert.

Q. You didn't have it done?

A. No.

Q. You always kept the brakeman at the rear end?

A. Yes.

Q. As you came along towards the switch, you whistled for the men to come from the shed?

A. Yes.

Q. And they would come out to the train. If it happened sometimes that they did not get out there when you were ready for them, you would stop the train and wait for them?

A. If I waited for those men, I didn't know it. They were always out there.

Q. Had not you waited that very day on the prior trip for them?

46 A. No.

Q. Didn't you sometimes stop there and blow your whistle for a long time before they would reach you?

A. No.

Q. You say each time you got up there they were ready to catch your train?

A. Yes; they would either be at the switch or one of them would probably come up and meet me and pull the pin. If he did, it would save me from doing it.

Q. Is it not a fact that you didn't pull that pin yourself but once?

A. I pulled it once before that morning.

Q. Isn't that the only time you pulled it?

A. The only train we ran that day.

Q. Wasn't that the only two times you ever pulled that pin during the time you worked there?

A. No.

Q. When did you ever pull it before?
A. Always when I started to make those drop switches.
Q. On that Martin mill dam line?
A. Yes. I pulled it as often as anybody else.
Q. You didn't wait for the switchmen to get there and get on?
A. No.
Q. When you got to the switch, how far did you run beyond it before you stopped?
A. It was five or six car lengths.
Q. What distance would that be?
A. If it was five car lengths, I would say 50 feet. I would say they were ten feet long.
Q. In about 50 feet you stopped and looked back?
A. Yes.
Q. Where were the cars?
47 A. At this time?
Q. When you looked back?
A. When I got crippled?
Q. Not the time you got crippled but when you first looked back after you stopped your engine?
A. When I turned around and looked, they were about 15 steps of the switch then.
Q. You was 50 feet beyond that?
A. Yes.
Q. You looked back as soon as you stopped your engine?
A. Yes.
Q. Before you got down on the ground?
A. Yes, before I stepped down.
Q. While up in the cab?
A. Yes.
Q. They were 15 feet of the switch and moving six miles an hour?
A. 15 steps.
Q. And moving six miles an hour?
A. Yes.
Q. When you got on the ground, did you look back again?
A. No.
Q. You just turned your back on them, and paid no more attention.
A. Yes; when I stepped out.
Q. They had 15 steps to travel before they got to the switch?
A. Yes.
Q. When you looked back, you saw Page was at the switch?
A. Yes; standing at the switch.
Q. If you had seen that switch was not thrown for the siding, you would have kept looking there to see whether it was done.
A. I would have looked at him.
48 Q. You could see the situation the switch bar was in from where you were standing, if you would have noticed it?
A. I don't know whether I could or not.

Q. It is a big iron bar with a big handle to it?
A. No.
Q. When you looked at it, you didn't notice whether it was open or not?
A. No.
Q. You could look down the track and see whether the switch was thrown?
A. These switches are almost like turning a corner. So was this.
Q. Weren't you right straight down the track ahead of it?
A. No.
Q. Was there a curve there?
A. A curve right where you take the switch.
Q. It curves into the shed?
A. It went to the right.
Q. I asked you if you had looked down the track. You were only 50 feet from the switch. That would be about the length of this room.
A. It might have been further. I will say it was that far.
Q. You think it was about that far.
A. It was every bit that far.
Q. You were towards the switch from the crossing. You had not crossed over the road crossing?
A. The engine was across. I was standing on the road crossing.
Q. You say it was about 50 feet from the switch. You say that is about correct?
A. It was that far.
Q. Was it any further?
A. I never measured it. I will say it was that far.
49 Q. If you think it was farther, about how far?
A. We will leave it 50 feet, if you want to.
Q. I don't want to leave it anywhere. I want to know what you know about it?
A. I know it was that far. That is, to the best of my knowledge.
Q. You had looked before you stepped down from your cab and saw the cars coming behind you, and they were 15 steps the other side of the switch.
A. Yes, before I stepped down.
Q. You say if you had noticed that the switch had not been thrown, you would have called to Page, or have found out what was the matter.
A. If I could have seen.
Q. Because you had moved this far, and the switch was still open. There was nothing to obstruct your view there.
A. No. I thought it was thrown.
Q. You took it for granted that it was thrown?
A. That it was already thrown.
Q. You didn't draw your attention and look to see if it was?
A. No.
Q. But if you had looked right at the rail, you would have seen the situation it was in?

A. I don't know whether I would have or not. I don't know whether I could have seen it.

Q. Don't you know at that distance you could have seen it?

A. No, I don't.

Q. Seeing two rails, whether they were open or shut?

A. But the way they are lined up around there, I don't know.

Q. What lined up?

A. It was left open. Never was closed up. Around that curve the way they were turned around, like turning a corner.

50 Q. What was still open

A. That switch.

Q. This iron handle, when it was thrown one way, it lay in this direction. (Indicating). It had a loop in it.

A. No.

Q. What did it have?

A. A flat bar of iron kinder out here at the side; no loop in it.

Q. Did it have a handle over there? (Indicating).

A. No.

Q. A smooth handle?

A. No; just flattened out a little right at the end.

Q. When in this direction, on this side of where it turned, the switch was thrown one way. When over this way (indicating) it was thrown the other way?

A. Yes.

Q. Being familiar with the switch, if you saw which was the handle was down, you would know whether the switch was open or shut?

A. I don't know whether I could have told or not.

Q. Don't know which way that handle indicated the switch was thrown?

A. I think I do.

Q. As long as you had been running there?

A. I think I do.

Q. So, if you had noticed this handle, you would have seen whether it was open or shut?

A. If I could have seen it, I would.

Q. As a matter of fact, you did not look at either track?

A. I never thought that it was.

Q. You say where you stopped on the road you was about 50 feet beyond the switch, and when you looked around the cars were about 15 steps east of the switch?

51 A. Yes.

Q. That would make about 35 yards between you and the cars when you looked around?

A. I suppose so.

Q. You sai- awhile ago when you started to make the flying switch you were only 40 yards from the switch east. That must be wrong?

A. I didn't say 40 yards.

Q. How far were you from the switch?

A. I said I pulled the pin at least 50 yards away.

Q. You got so far ahead of it that when you stopped 50 yards

beyond the switch, you were 35 yards ahead of the cars, and they were 15 feet (steps) the other side of the switch.

A. I said when I went through the switch, they were 40 yards behind me.

Q. You pulled the pin about 50 yards from the switch?

A. Yes.

Q. Did you always get down on the ground to fire your engine?

A. I always did to pull the cinders out. I could stand up there and use the shovel in there; a No. 2 railroad or "snipe" shovel.

Q. I will ask you if, in your experience in switching a string of cars behind an engine, making a flying switch, you don't sometimes split the switch?

A. It is done occasionally.

Q. That does happen?

A. Yes.

Q. When a thing like that happens, when they split the switch, they either jump the track or come on down the track where the engine is?

A. I always though- they would come right down straddle or across or between the switch.

Q. But if they split the switch completely, they would come on where the engine was?

52 A. No, they would come right straddle.

Q. In your experience in switching cars, it sometimes happened that a piece of wood or a lump of coal would get in between the switch flange and the rail, and the switch can't move when you pull it?

A. You take the regular switch stand, you would know it all right. You can throw it around. You have got a certain place to work in. There is a notch there. You bend the lever down and lock it, and when you throw it around the other way you do the same.

Q. You could not get it around there if there was a piece of wood or coal in there.

A. No.

Q. That does happen on railroads that switches are blocked that way. Is that what they call "blocking the switch" when they can't throw it?

A. I don't know what they call it.

Q. With this switch out there at the mines, that could happen just as well with some piece of trash or dirt getting in there, and even if a man did pull at that lever it would not swing?

A. I don't know; they had it fixed up pretty well.

Q. In switching in that shed, that could happen too. Are not pieces of coal dropped off? It might get in there and you not know it when you come to throw it. And when you try to throw it, that might stop it?

A. Yes.

Q. You were familiar with that situation?

A. Yes.

Q. When you turned your back on the switch, you took chances

on whatever might happen to it, whether it split the switch whether the switch would not turn when thrown?

A. If it was thrown, I would not have been afraid of it.

Q. But when you looked back and saw the cars beyond
53 you took chances on everything working all right there?

A. Yes. I was relying on the switch being thrown.

Q. If you had looked a second longer, you would have se whether the cars took the switch?

A. I could almost have had her hot again.

Q. While these cars were running 15 yards?

A. Yes. I was in a hurry then.

Q. If you had taken a second's time, you could have been su that the cars took the switch?

A. No, not a second.

Q. Say, a few second-. If you had been looking, and these ca traveling six miles an hour, and running 15 yards. As a matt of fact, your fire did not need attention so bad that you could affo to risk your life. You would not have put your life in danger fix that fire?

A. No, if I had not thought the switch was thrown, I would no

Q. If you had taken but a second longer to be sure the swit was thrown all right, that would have been the thing to do, rath than, in your hurry, to stop and fix the fire. That's right?

A. Yes.

Q. You spoke of sitting up in the cab. You had the enginee side to work on, and you could lean out of the window on the rig hand side?

A. Yes.

Q. There was no fireman's side.

A. Yes.

Q. It had coal there?

A. Yes.

Q. You say you were sitting up in this place running the engine

A. Yes.

Q. You were coming on down, and when you got in about 5 yards of the switch you pulled the pin. Were you watching ahea seeing what happened down ahead of you?

54 A. Yes.

Q. Sitting up on your side?

A. Yes. I was about 75 yards away when I first saw them the switch.

Q. Did you have your head out of the window and your arm o that cushion?

A. Yes.

Q. Are you right-handed or left-handed?

A. Any old way, when it comes to anything of that kind.

Q. Which are you, right-handed or left-handed, or do you us both hands equally as well?

A. Anybody can handle an engine with his left hand; the throttl or brake.

Q. You are right-handed?

A. I chop right-handed.
Q. Which hand did you reach back for that coupling pin with?
A. My left hand.
Q. You let the throttel go?
A. Yes.
Q. So, your engine was running along without your hand on the throttel?
A. Yes.
Q. You did that until you pulled the pin, because you were in a hurry. Wouldn't it have been better for you to have waited until that switchman had clim-ed on the cars and assisted you in that?
A. He wasn't there. He was down at the switch.
Q. You could have waited a second?
A. I could have stopped and waited on it.
Q. That would not have made any difference, except the loss of time. Wouldn't that have been the proper thing to do under the circumstances; wait a second or two and do like you had been doing?
A. I had not been used to such a thing, stopping it
55 Q. I thought you sai- you had been in the habit of letting the switchman get on the engine right there to pull the pin?
A. No; I said if he was up there. If he wasn't, I would pull the pin.
Q. So then you didn't think you were doing anything unusual when you pulled that pin and went on by the switch?
A. I did not.
Q. Which side of the track was McLaughlin on?
A. Passed me on the right. He was going east and I was going west.
Q. On the same side as Page?
A. Yes; on the right.
Q. Had Page made the first switch that morning?
A. Jim Paris made the first switch. He had been there a long time, and they took him off. He come out and got the first train.
Q. That was the first switching Page and McLaughlin had been out to that morning?
A. No, it was the second. They got the cars from the red ore mine.
Q. I mean the first switching on the Martin mine trip?
A. Yes, but they got the train before.
Q. You spoke a while ago about there being two miles of track. You mean, counting the sidings and everything?
A. Yes.
Q. As a matter of fact, there is only a third of a mile of straight track?
A. Three-quarters of a mile out where they were mining.
Q. Was that the extreme length of it?
A. That's as far as they had built; yes.
Q. That was the extreme length of the tracks. Some of that switching would be done, not only with the engine, but to stop and push the cars along.

56 A. No. They had us out there for that business.

Q. But didn't they have to move those loaded cars arou by pushing?

A. They used to before getting the engine, but not afterwards.

Q. When you were working at the Martin mine, wouldn't th roll the other cars back in on the track by hand, and push them u and down until they got them loaded?

A. No.

Q. You don't know of that, if they did?

—. ——.

A. It has happened sometimes in there that some of the cars o other tracks than you were working on would escape, would get loo from the brakeman and run down and you would have to catc them, or somebody. That has happened since you have been there

A. Not that I know of.

Redirect examination:

Q. Mr. Loughborough asked you if you had been watchin State whether or not you was at that time doing just as was th custom, just as you usually did?

A. That's what I was going. I was doing as I had always don

Q. This track that the cars were expected to take branched o to the right.

A. No. I take the right hand track going in there. This north and south (indicating).

Q. You were up here, coming in here to the track (indicating

A. I was going west.

Q. This is what the cars are expected to take (indicating)?

A. No, I was to take in there.

Q. The engine took this switch to the right.

A. Yes.

Q. So that when you came down here to this road crossing, yo were around the curve partially so that you could not hav

57 told whether this switch was open or closed?

A. No.

Q. That iron bar is just a small iron bar, you say, that lays fla down either one way or the other on this sill?

A. Yes.

Q. Is it not true that when you got down there you were absorbe in your business, entirely absorbed in getting your cars or engin ready to go to this other mine?

A. Yes, to back up to this other mine. She had to be hot to ge up there to handle these cars.

Q. I asked you to state whether or not you were absorbed in tha business at the time that you had got down there and thought thes other men were back up there for the purpose of doing what the usually did?

A. Yes. If they had done their duty, I would have been a-1 righ today.

Q. You thought they would?

A. I relied upon them. They always did it before.

Q. They were right there at the place?
A. Yes.
Q. Mr. Loughborough asked you if there had been a piece of coal or something in that switch. If that had been true, state if the man at the switch would have known it?
A. Yes.
Q. He could have told it better than you?
A. Yes. I could not have told anything about it. He could have told it, the man that was throwing it, if there had been anything there.
Q. If there had been anything of that sort and he found it out before the cars got there, he could have warned you by hallowing?
A. Yes.
Q. He didn't warn you?
58 A. No.
Q. He just stopped there without warning you at all and let the cars run in on you?
A. Yes.
Q. It was his duty to stay and throw the switch so that they would not come in on you?
A. Yes. That was his business there. He had been at it. I had no reason to think that he would not do it.
Q. If you thought that he had not done it, you would not have gotten down there?
A. I would not have been going with one leg today, if I didn't think that.
Q. Your business wasn't to throw that switch?
A. No; they had a man there for that purpose.
Q. That was no part of your business?
A. No.
Q. They had these other men especially for that business?
A. Yes.
Q. I think Mr. Armistead asked you, and I think you stated, that the cars could be put into that place in no other way but the way you undertook to put them in at that time?
A. That was the only track you could run them in on.
Q. That was the only way you could make that switch?
A. Yes, the only way; it was kick or drop, it made no difference where you got them.

Recross-examination:

Q. You say when you passed Page you told him, "you boys be here on time the next time."
A. No, I said to one of them, "you must come up and pull this pin."
Q. "Be in time to pull the pin."
59 A. "Come up and pull this pin." They were already there. I said if it happened to be tight, I could not do it; I wanted them to come up there.
Q. That was not what you said about it.

A. I don't know.

Q. You were directing that part of the work, how to drop the cars down in there from your engine?

A. They all knew how it was done.

Q. In case anybody wanted any instructions about it, you instructed them right there with your engine?

A. Nobody asked me nothing.

Q. Nothing ever went wrong?

A. No; it never did before.

Q. After you were hurt and some of them came up to you, state if you didn't make the remark in the presence of the crowd assembled around there that you had pulled the pin yourself and didn't blame anybody, that it was all your fault?

A. No.

Redirect examination:

Q. But if that statement had been made, is it true or not?

A. No; it makes no difference who told it.

60 *Testimony of Dr. Dewell Gann.*

Dr. DEWELL GANN, being duly sworn, testified for the plaintiff:

(Examined by T. M. MEHAFFY, Esqr.:)

Q. You are a practicing physician and surgeon?

A. Yes.

Q. How long have you been practicing?

A. 22 years.

Q. You are a graduate of what school?

A. Southern Medical College of Atlanta, Ga.

Q. Do you know Mr. Ramsey, the plaintiff in this case?

A. Yes.

Q. Were you called to see him when he was injured on the 18th of June, 1907?

A. Yes.

Q. Do you know about what time you got there? I mean what time of day?

A. I am not positive, but about 11:00 or 12:00 o'clock.

Q. Did you find him suffering when you got there?

A. Yes.

Q. How? Tell the jury what the extent of his injury and suffering was?

A. His leg was practically crushed, you would call it. Of course, he suffered a good deal of pain; it was broken up in such a manner that it became necessary to amputate it.

Q. His left leg was crushed?

A. I don't remember which leg it was.

Q. Anyhow, the leg you amputated was crushed?

A. Yes.

Q. Who assisted you in the amputation?

A. Dr. W. E. Morris and Dr. Cheney. I don't know his initials.
Q. Do you know anything about his suffering after that? Did you treat him?
A. No. I left soon after the operation and came back home.
61 Q. But he was suffering great pain before the amputation?
A. Yes.
Q. And the injury was such, was it, that it would cause very great suffering?
A. Yes.
Q. What would be your idea about his future suffering?
A. I don't know. Of course, most all stumps give a man more or less pain sometime during life, but not necessarily in every case.
Q. I don't mean any constant suffering, but I just want to know whether or not it is your opinion that he would probably suffer from the injury in the future?
A. I don't know of course, the worst is over, you know. It might be at times he would suffer, and probably would. They do that. But not necessarily by constant suffering.
Q. Do you know anything about the injury to the stump a second time?
A. Yes. I said before that I had not treated him. I was called to his house when he fell.
Q. State whether or not that was painful?
A. Yes. That was bound to have given him more or less pain.
Q. He was sent on back to Little Rock?
A. I didn't see him any more.

This being all the evidence introduced by plaintiff in support of his main case, he rested.

62 The defendant, to sustain the issues in its behalf, introduced the following witnesses:

Testimony of R. L. Page.

R. L. PAGE, being duly sworn, testified as follows:

(By Mr. LOUGHBOROUGH:)

Q. State your name, age and residence?
A. R. L. Page, age 23 years, residence, Bauxite, Ark.
Q. Do you work for the defendant, Aluminum Company of America?
A. Yes.
Q. How long have you been at work for them?
A. I have been at work about a year.
Q. Were you at work for them on the day that Mr. Ramsey was hurt by the cars bumping into him?
A. Yes.
Q. How would those cars be brought in from the Martin mine and handled so that the cars would go into the shed?

A. We always made a drop of the cars. The engine would pull the cars down on the hill, and then we went to meet them, and one of us was supposed to get on the cars and cut the engine off and ride the engine in the clear, on what is called the right hand track, the engine taking the right hand track.

Q. You say you would get on at the engine and cut it off.

A. Cut the engine off and ride the engine in the clear, and drop off and throw the switch for the main line, so that the cars would run on into the shed.

Q. You would ride the engine to the switch—that would be ahead of the cars—and get off at the switch and turn the switch so that the cars would go into the shed.

A. Yes. There was always two of us went from the shed to meet the train. They always whistled for us up there; they had been getting ore all the time from what is known as the Johnson mine. The engine had always been pulling in.

63 Q. What happened just before this accident. Did you and anybody come out to meet the train?

A. Yes. Sam McLaughlin and I.

Q. Where is he? Is he here?

A. He is not here.

Q. What happened when you got out there, and what did you do, and how was the train switched? Explain all that happened up to the accident?

A. The engine was pulling the cars, and we were supposed to make a drop of the cars.

Q. Did you get on the engine as was the custom?

A. No. I passed the switch stand; I ran past the switch stand.

Q. Running east or west?

A. Running east. He had done cut the engine aloose from the cars, and as he passed me he said, "Bob, I want you to be here the next time to pull this pin." I said "A-l right, Houston, I will." That was about 20 yards from the switch stand. I ran on and caught the cars. The engine had done been cut aloose.

Q. In what direction did you run?

A. East.

Q. That's the way they were coming from?

A. I caught four cars from the engine, and McLaughlin caught about four cars back from me.

Q. At the time the engine passed you, how far were you east of the switch?

—. ——.

Q. What else did you do besides setting the brakes on the cars after they got down in the shed?

A. After they got into the shed?

Q. What other duties did you have?

A. Have to keep the cars shoved up to the crusher there where they were crushing the ore.

64 Q. When the engine would go out to the mines and come back with a string of cars, would it give any signal for you to come out to them?

A. Yes, they would whistle four times for us.
Q. I will ask you if it happened occasionally or frequently at he time they would whistle that your work was so that you could ot get out there right away?
A. Yes; we were busy in the shed.
Q. What was the custom of the engineer under those circumtances, when you didn't come right out when he whistled?
A. He would whistle several times for us.
Q. Would he keep moving or stop?
A. He would stop.
Q. He would wait for you to come up?
A. Yes.
Q. Would you go on then and catch the train?
A. Yes.
Q. How long had you been engaged in that work at the time this ccident happened?
A. Two weeks.
Q. Had you made any switches that morning before this accident appened?
A. No, I had not any from that place.
Q. Did you make a switch from the other mine?
A. Yes.
Q. Explain to the jury how the whole thing happened, who went vith you from the shed, if anybody, and what you did.
A. I was about 20 yards from the switch.
Q. You ran east and climbed on the cars?
A. Yes.
Q. That was on which side of the track? The side the switch vas on?
A. Yes, on the left hand side of the track.
Q. Had you stopped after you left the shed before you got to the engine?
A. No. I had not. Mr. Pipkin, the shed foreman, sent us out there; we went on a run to meet the train.
Q. State whether you and McLaughlin stopped and sat on the coal box?
A. No.
Q. Was any body at the switch to throw the switch after the engine passed?
A. No.
Q. You were four cars back?
A. Yes.
Q. Would it have been possible for you to get ahead of them and throw the switch?
A. No.
Q. They ran in on the siding?
A. Yes.
Q. Where was McLaughlin? On which side of the track was he?
A. He was on the right hand side of the track. I went on the left side.
Q. The same side or opposite side?

A. The opposite side from him.
Q. Where did he get on the train?
A. About three cars from me back.
Q. Who else was on the train besides you and McLaughlin?
A. Forrest Raper.
Q. Where was he?
A. He was on the rear end of the last car.
Q. Was he the regular brakeman who went with the train?
A. Yes.
Q. Had you ever seen or known of Ramsey pulling the pin for himself before on any of those runs?
66 A. No, not before.
Q. When the engine passed the switch, was there any one standing at the switch to throw it to deflect the cars on the other track?
A. No.
Q. I believe you said you were about 20 yards east of the switch when the engine passed you?
A. Yes. About 20 yards.
Q. Running in the opposite direction?
A. Yes.
Q. I will ask if it had been the custom before that, when you didn't get to the train shortly after it whistled, while it was in motion, for the engineer to stop and wait for you to get out there?
A. Yes.
Q. Did he do that that day?
A. No. Yes. No, he didn't that day.
Q. Not the day of the accident?
A. No. He had done that.
Q. I ask what his custom was about that?
A. He generally stopped.
Q. Stopped and waited for you?
A. But that was my first trip out since he had been getting ore from this new place. That was my first trip.
Q. The first trip on the Martin mine track?
A. He had been getting ore from another mine. That was a new place we had been getting ore from that morning.
Q. Had you made a trip there once before that morning to that mine?
A. No. That was my first trip.
Q. Do you know who did make the trip?
A. No, I do not.
Q. How far did the engine run beyond the switch before it stopped?
67 A. I suppose about 20 steps.
Q. Is there a land mark or crossing there?
A. Yes.
Q. Did the engine stop on the crossing?
A. It stopped on the crossing.
Q. When the engine passed you when he pulled the pin, I will

ask you whether it was going fast enough for you or too fast for you to get on?

A. It was going almost too fast for me to get on. I might have got on but might have gotten hurt in getting on. I considered it was going too fast for me to get on.

Q. You thought it would be risky?

A. Yes, I did.

Cross-examination by Mr. MEHAFFY:

Q. How far away from the switch were you?

A. About 20 yards.

Q. How far east were the cars?

A. They were about 30 yards.

Q. You were between the cars and the switch?

A. Yes.

Q. You ran on and caught the cars?

A. Yes.

Q. Didn't you know that if that switch was not thrown or changed that the cars would follow the engine?

A. I didn't know it. If I did know it, it would not have been me to throw the switch.

Q. Didn't ask you about that. Didn't you know when that engine went on down there and you went back to catch the train, and there was absolutely nobody there to change that switch, that the cars would follow that engine?

A. Certainly.

68 Q. You knew that. You were the only person near enough there to throw that switch?

A. I could not have thrown it.

Q. Wer-n't you the only person near enough?

A. I don't know whether I was or not.

Q. You just spoke a moment ago about riding on the engine and seemed to give an excuse for not riding down to the switch on the engine then because it was going too fast. What did you want to get on the engine at all for?

A. I didn't get on the engine.

Q. But you said it was going too fast that you were afraid you would get hurt. What object was there in getting on the engine, you or any body else?

A. There didn't any body get on the engine.

Q. What object was there in anybody getting on it. What did they want to get on it for? Don't you know?

A. I suppose if there had been any one got on, they would been intending to throw the switch for the engine to go on.

Q. Don't you know the only purpose of getting on the engine was to ride down to the switch and throw the switch?

A. Yes.

Q. Don't you know there was nobody else to throw the switch?

A. No, I did not.

Q. Why? Wer-n't you right there? Didn't you come right by there?

A. Yes.

Q. Didn't you know there was no one there?
A. No.
Q. There was nothing to keep you from seeing if there had been anybody?
A. I suppose not, but I didn't know it.
Q. You didn't look, then?
69 A. No.
Q. What were your duties?
A. I suppose my duty was to get on the engine and pull the pin and ride the engine in the clear, and then throw the switch.
Q. Those duties you did not perform?
A. No. He didn't stop for me.
Q. Did it make any difference who pulled the pin? You knew it was pulled?
A. Yes it was pulled.
Q. If it was your duty to pull the pin and ride down until the engine got in the clear and throw the switch and the pin had been already pulled, and you knew it didn't you know then that you ought to throw the switch?
A. I could not have thrown the switch.
Q. Why?
A. I could not get to it.
Q. With the cars 30 yards back?
A. It would have been impossible.
Q. Why? Didn't you say the engine went by you, and you thought it was running too fast for you to get on. Couldn't you have gotten to the switch then, just followed the engine, instead of running 30 yards east to catch the cars?
A. I didn't, it was my duty to do it.
Q. You, just a moment ago, said it was your duty to get on the engine, pull the pin and ride the engine on down.
A. That's what I heard. I didn't know it at that time.
Q. You heard it later?
A. Yes.
Q. You didn't know what you were there for?
A. No.
Q. You just knew you were there, but didn't know what for?
A. I knew I was there.
70 Q. But you didn't know what for?
A. No. I knew I was to ride the cars in. We had been in the shed all the time. They were getting ore from a new place, and I didn't know how they worked that.
Q. You didn't know what your business was there?
A. No. I didn't know how they worked it from that mine. That was the first trip out.
Q. You have been talking about getting on the engine and pulling the pin and riding to the switch and throwing it. That you learned after this occurred. Is that true?
A. Yes.
Q. What did you mean a while ago when you stated that it was the custom to do this? Did you learn that afterwards, too?
A. No.

Q. Then, if you knew that was the custom, why didn't you know it was your duty, then?

A. I knew it was the custom for him to stop up there and whistle.

Q. He didn't stop when the man whose business was to throw the switch was down there any where about the switch?

A. What is that?

Q. Isn't it true that he stopped only when there wasn't anybody out there and waited for you to come?

A. Yes.

Q. But when you were out there as you were on this occasion——

A. (Interrupting.) He did not stop.

Q. There was no occasion to.

A. We were not out there.

Q. Wer-n't you right by the engine?

A. We ran by the engine. I ran by the engine.

Q. It was going west and you were going east?

A. Yes.

Q. How near was it to the switch when you ran by it?

71 A. It was 20 or 25 yards; I don't know the exact distance.

Q. Where did you run from?

A. I was running to get on the cars.

Q. Had not you ran right from the switch?

A. Yes.

Q. So that when he come there you were right at the switch?

A. No.

Q. Where were you?

A. I was done past the switch running.

Q. When come down there to where he got in sight and lifted his pin, you were down then at the switch?

A. No.

Q. You said you ran right from the switch up there and passed him about 25 yards. Where was he when you were at the switch?

A. He was about 40 yards from me when he pulled this pin.

Q. Wer-n't you then at the switch?

A. No, I was not.

Q. When were you at the switch?

A. I had done passed the switch.

Q. When? About where was he when you passed it?

A. He was about 40 yards.

Q. When you passed the switch?

A. Yes.

Q. You were right there at the switch when he was 40 yards east of it?

A. Yes.

Q. You ran up to the engine and found he had already pulled the pin?

A. Yes, about 20 yards from the switch.

Q. And you clim-ed on the cars?

A. Yes.

Q. And just let them follow right along down after the engine?

72 A. Yes.
Q. You never gave him any warning at all?
A. I got on the cars.
Q. What did you get on for?
A. I wanted to set the brakes as I usually did.
Q. But you didn't warn him that you were coming right in o that switch?
A. I hollowed at him. That's all the way I had to warn hi
Q. Where were you when you did that?
A. I suppose I was about three car lengths.
Q. Had you already come on to the switch?
A. Yes. We were going on the switch when I commenced ho lowing.
Q. What had been your duties for the two weeks you had bee there?
A. My duty had been to ride the cars into the shed and set th brakes so that they would not bump.
Q. Had not part of it been to throw the switch?
A. No.
Q. You had not thrown the switch either at that place or th other?
A. No. I had not been throwing the switch.
Q. Who had been?
A. The brakeman.
Q. Who was that?
A. Forrest Raper.
Q. But you knew at this time that he was back on the rear ca
A. No, I did not.
Q. Did you think there was somebody down at the switch whe you passed there?
A. No.
Q. You knew there was not?
A. Yes, I do.
73 Q. You knew it could not have been thrown unless yo did it?
A. No, I didn't know that.
Q. Why?
A. Because it wasn't any more my duty than it was the oth fellow's.
Q. I am not asking you about your duty. You knew when yo passed there that there wasn't anybody there to throw it?
A. I knew there wasn't anybody there. No.
Q. You knew that?
A. Yes.
Q. You knew when you was running back there that these ca would necessarily follow the engine?
A. Certainly I knew it, if there wasn't anybody there to thro the switch.
Q. You knew there wasn't any one there. Then you knew the would follow the engine?
A. No, I didn't know it.

Q. Why?
A. Because——
Q. (Interrupting.) It takes a man to throw the switch?
A. Yes.
Q. But you said there wasn't anybody there to do it?
A. There wasn't when I passed there.
Q. Was there anybody in sight that could get there?
A. No.
Q. McLaughlin was farther away than you?
A. Yes.
Q. There was nobody in sight?
A. No.
Q. If there was nobody in sight, didn't you know you could get there easier than anybody else?
A. No, I did not.
74 Q. Are you still working for that company?
A. Yes.
Q. In what capacity?
A. Anything they need to do around there; common labor.
Q. You had been there two weeks only?
A. Yes.
Q. Didn't you tell the jury awhile ago, when Mr. Loughborough asked you, that you knew the custom there about pulling that pin?
A. I knew the custom; how they had been pulling it.
Q. How many times had you seen it done?
A. Not the way they pulled it that morning?
Q. How many times had you seen it pulled in that way?
A. I had been working there two weeks and had seen——
Q. (Interrupting.) You had never set the switch in your life?
A. No. The engine had been pushing the cars ahead of it all the time.
Q. On the other switch?
A. Yes.
Q. When you were out there performing duties at this place, you really didn't know what your duties were?
A. No.
Q. You had not been instructed at all?
A. No.

Cross-examination continued by Mr. ARMISTEAD:

Q. How long did you work for the company besides these two weeks you had been in this business?
A. I suppose about five months.
Q. What had you been doing?
A. I had been working at the saw mill most of the time.
Q. Whose saw mill?
A. The company's saw mill.
75 Q. Where is that with reference to the mines?
A. Right there close.
Q. How far?
A. I suppose a half or a quarter.

Q. How often had you been about the tracks, the place wh this accident happened and the switch, before you went to w for them?

A. I had not been there very often.

Q. Didn't you go there very frequently?

A. No.

Q. You passed right by nearly every day?

A. No.

Q. You would go around it?

A. I didn't have any occasion to go by there. I boarded the otl way from there.

Q. We understood you to state that you had never thrown t switch in order to drop these cars into the ore bins.

A. No.

Q. You have never done it since?

A. No.

Q. What did you go out there for?

A. Went out there to meet the cars and set the brakes.

Q. To set them when?

A. We were going to set them when we started into the sh

Q. How were the cars going into the shed?

A. They would go by gravity into the shed; give them a lit start up there.

Q. Which way was the engine going?

A. Going west.

Q. Then, the cars were going south and west, too?

A. They were going west. The cars were going west.

Q. Did you expect the cars to go down the same track as t engine?

76 A. No.

Q. What track did you expect the engine to go dow

A. I expected it to take the right hand track as usual.

Q. What track did you expect the cars to take?

A. I expected them to take the main line into the shed.

Q. How did you expect them to take the main line into the sh and the engine to take the right hand track if there was no o there to throw the switch?

A. I didn't know whether there was any one there to throw t switch or not.

Q. How many times had you been out there before and ridd the cars in?

A. I had been there quite a number of times, but not from th place. It was a new mine altogether they were getting ore fro that morning.

Q. Who told you to go out there that day?

A. The mill foreman.

Q. Was that the first time you had been out there under li circumstances?

A. Yes, that morning.

Q. Did the mill foreman tell you the cars would take the m track without the switch being thrown?

A. No, he did not.
Q. Did he tell you the switch would be thrown?
A. No.
Q. Did he tell you to throw the switch?
A. No.
Q. Did you know there was a switch there?
A. Yes.
Q. Did you expect it to throw itself?
A. No.

77 Q. Did you expect the engine to throw it? (Counsel for defendant objected to plaintiff's counsel badgering the witness in this manner.) Who did you expect to throw the switch? Did you expect any one to throw it?

A. I didn't know who was to throw it, because I didn't know it was my duty to throw the switch.
Q. Did you expect any one to throw it?
A. No, I did not. Yes, I expected somebody to throw it.
Q. You didn't know who?
A. No, I didn't know who.
Q. You say that you were told afterwards that it was your duty to throw it. Who told you afterwards?
A. I heard.
Q. How long afterwards?
A. I don't know just exactly the time.
Q. What place?
A. I don't know where the place was.
Q. Was it in this county?
A. Yes.
Q. Was it in Benton?
A. No, in Bauxite.
Q. Was it some one who worked for the company?
A. No, it was not.
Q. It was some one who did not work for the company?
A. Yes.
Q. Was it a white man?
A. Yes.
Q. A young man?
A. Yes, it was a young man.
Q. Can you tell who it was?
A. No. I refuse to tell who it was.

Mr. LOUGHBOROUGH: We have no objections to his telling who it was.

78 Q. You state that the whistle blew how many times?
A. They usually blew four times.
Q. How many times did they blow this time?
A. They blew about eight times before we heard.
Q. Who started with you?
A. Sam McLaughlin, the fellow who helped me.
Q. Who told you to go?
A. Mr. Pipkin, the shed foreman.
Q. What did he tell you to go and do?

A. He told us to go and meet the train, that they were whistl for us, I believe.

Q. What did he tell you to do when you met the train?

A. We knew; to ride the cars into the shed. He didn't have tell us that.

Q. How did you know you were to ride the cars into the shed you had never gone out there before or switched the cars before?

A. We knew we had been riding them into the shed, and thought we were supposed to do the same thing that time.

Q. You knew you had been doing it, and therefore you w supposed to do it, but you just now stated you had not done it fore. How do you reconcile those two statements?

A. Had I rode the cars in before? Certainly; I had been ridi them in for two weeks.

Q. Who did the switching when you rode them in before?

A. The brakeman.

Q. What is his name?

A. Forrest Raper.

Q. He did the switching every time?

A. Yes.

Q. When you went out to ride them in before, where would pin be pulled?

A. The engine was always pushing the cars. It had
79. cars in ahead of it, and the pin would be pulled right on head end of the engine.

Q. They would be kicked in?

A. Kicked into the shed. All we had to do was to get on cars and ride them in.

Q. You had been there two weeks and never saw them dropped there before?

A. No, they had never ran from that place before.

Q. You state that you passed the switch, and the engine pass you. How fast was the engine going?

A. I suppose making 20 miles an hour probably; 15 or 20 mil

Q. It was 20 yards from the switch?

A. Yes.

Q. How far were the cars from the engine when the engine pass you?

A. They were about 15 yards.

Q. How fast were they going?

A. They were not going over 8 miles an hour.

Q. You were 20 yards from the switch?

A. Yes.

Q. And the cars were 15 yards from you?

A. Yes, about 15 or 20 yards. I don't know the exact distan That's my judgment.

Q. They were traveling eight miles an hour?

A. Yes.

Q. You then had time to go to the switch and throw it?

A. No.

Q. Couldn't you travel faster than eight miles an hour?

A. No, I don't think I could.

Q. Do you know a man can walk four miles an hour?
A. I suppose he could.
Q. You didn't go to the switch because you could not beat the cars there, and they were 15 yards from you, and you were
80 20 yards from the switch, and they were traveling eight miles an hour.
A. I didn't try to beat the cars.
Q. You just left the switch open?
A. It was open.
Q. Do you know B. G. Bullock?
A. Yes.
Q. Where does he live?
A. I think he lives in Shaw township.
Q. Did you see him on the day of the accident?
A. No, I did not; not that I remember.
Q. Where did you go after this accident?
A. I went to the doctor's office after a cot to carry him over there.
Q. Where did you go then?
A. I helped carry him over there to the doctor's office.
Q. Where did you go then?
A. I went back to work.
Q. How long did you work?
A. I worked all day.
Q. Where did you go that night?
A. I went home, to my boarding place.
Q. Did you stop in front of Dr. Morris's office that evening as you were going from work?
A. No; I came back there after supper?
Q. About what time were you there after supper?
A. About 7:30 o'clock.
Q. Did you see Mr. Bullock there after supper?
A. Yes.
Q. Did you have a conversation with him?
A. Not that I remember.
Q. You mean you don't remember, or that you did not have a conversation?
81 A. I don't remember whether I had a conversation or not.
Q. Did you not that night, at that time and at that place, to B. G. Bullock, say in substance about this accident, "I take the whole blame upon myself. I was sitting on the coal box when Houston gave the signal that he was going to cut loose and make the flying switch. I stood with my foot on the switch, and stepped on the car when it reached the switch, and rode it within four feet of Houston before I though- what I was there for."
A. No.
Q. Did you make any such statement?
A. No.
Q. Did you make any statement to him?
A. No.
Q. Did you talk about the accident that night?
A. Not to him, not that I remember.

Q. Do you know B. L. B. Thompson?
A. Yes.
Q. Did he help carry Ramsey into the doctor's office?
A. Yes.
Q. Did you help?
A. Yes.
Q. Did you make any statement to him in carrying Houston to the doctor's office on the morning of the accident and after the accident in effect that it was your own fault?
A. No, I did not. I can tell you what I did say, though. I said, "I felt like as that I was in the fault; that I felt like it." I didn't say that I was in the fault, but told him that I did feel like it when I saw him lying over there at the store when I went after the cot. I told him that I felt like I was the cause of Houston's getting hurt. I didn't say that I was the cause of it.
Q. You still feel that you were the cause of it?
A. No, I do not now.
82 Q. What has changed your feeling?
A. I got over my excitement, I suppose.
Q. Do you know Robert Croxson?
A. Yes.
Q. Did you see him the morning of the accident?
A. No, not that I remember.
Q. Do you mean to say that if you saw him you don't remember?
A. No, I don't remember.
Q. Didn't you see him in front of Hornbarger's store or the company store the morning of the accident?
A. I don't remember whether I did or not.
Q. Did you say anything to him about the accident?
A. No.
Q. Did you have any conversation with him that morning?
A. No.
Q. Did you have any conversation with him in which you told him that you thought it was your fault?
A. No.
Q. Do you know H. A. Chambers?
A. Yes.
Q. Did you see him the day of the accident?
A. No.
Q. Is it not a fact that you saw him between 11:00 and 12:00 o'clock at the doctor's office?
A. Yes I saw him.
Q. Is it not a fact that you said to him at that time that you felt that you were to blame for it, and that if you had thrown the switch the accident would not have happened?
A. No, I did not.
Q. Did you state that in substance to him?
A. No.
Q. You mean to say you made no such statement to him?
83 A. No, not that I remember.
Q. Would you have remembered it if you had made it?

A. I think so.
Q. You have gotten to a stage where you don't remember anything?

Mr. LOUGHBOROUGH: We object to counsel deliberately insulting the witness.
Mr. ARMISTEAD: He is insulting himself.

Q. Were you drinking that morning, Bob?
A. No.
Q. Had you had a drink?
A. No, not a drop.
Q. Did you have a drink after the accident?
A. No.

Redirect examination:

Q. When you passed the switch going out to meet that train, did you stop at it at all?
A. No.
Q. You just kept going?
A. Yes.
Q. You were in a run?
A. Yes.
Q. You didn't get on the front end car but several car lengths back?
A. Three or four cars back.
Q. How many brakes did you set after you got on the cars?
A. Two brakes before it hit Houston.
Q. How soon did you see that the cars had taken the switch where the engine was?
A. I suppose there was one car in the switch before I noticed it; probably 1½ or 2.
Q. What did you do when you saw it had taken that switch behind the engine?
84 A. I commenced hollowing at Houston.
Q. Did he heed your calls?
A. No, he didn't hear me.
Q. He didn't appear to hear you?
A. No, he didn't appear to hear me.
Q. In regard to any conversation you had with B. L. B. Thompson, who is he?
A. He does not do anything, I don't think. He lives out there close to Bauxite somewhere.
Q. What was it you told him in regard to this accident, and when was it?
A. I told him this morning that if he got up and swore that that it was false.
Q. I mean the conversation you had with him the day of the accident? I understood you to say you had some conversation with him on the day of the accident, is that right?
A. Yes.
Q. What did you tell him that day?

A. I told him I felt like I was the cause of Houston getting hurt.

Q. I will ask you if you were much affected by the accident, whether you cried when it happened, etc.?

A. No, I didn't cry. Of course, it excited me. I hated to see the boy in that condition. I will admit that it excited me.

Q. When you said you felt that you had been to blame in the matter, what did you have in mind in which you were to blame?

A. I thought that that was my duty, you know, to throw the switch, and that I did not.

Q. That you should have stopped at the switch instead of running on?

A. Yes.

Q. Is that what you had in mind when you told him?

85 A. Yes.

Q. Did you ever state to him or anybody else that you were at the switch in time to have thrown it and failed to throw it?

A. No.

Q. Is that a fact at all?

A. No.

Q. When you passed the switch, do you remember whether you noticed to see which track was thrown? That is when out to meet the cars?

A. It was thrown from the right hand track.

Q. When Ramsey hollowed at you as you passed the engine, what did he say in regard to pulling the pin or throwing the switch?

A. He said "Bob, I want you to be here next time and pull the pin." I said "Al- right, Houston, I will."

Q. Do you know whether somebody else, the brakeman, was in the engine at that time?

A. I did not know.

Q. You did not know who was to throw the switch for the cars?

A. No.

Recross-examination by Mr. MEHAFFY:

Q. You said you didn't know that the brakeman was on that engine?

A. No.

Q. Didn't you testify in your examination in chief that Ramsey himself pulled the pin?

A. Yes.

Q. Don't you know it would have been impossible for the brakeman to have been there without you seeing him?

A. No, it would not have been impossible. He could have been in the cab and me not have seen him.

Q. If you actually said what you say you did to Thompson what did you want to tell him that if he swore that it would be

86 false? You say you said to Thompson that you felt it was your fault, and asked why you say you felt it was your fault, you say you felt it was your duty to throw the switch. If you told Thompson that why did you say anything to him about

he swore that it would be false? It would not have been false? would have been true, according to your statement now?
A. Yes.

Redirect examination:

Q. When did you tell Thompson that if he swore to a certain atement he would swear to something that wasn't true?
A. This morning.
Q. What was the statement he said he was going to swear to?
A. He said he was going to swear that I said I was the whole ause of it.
Q. Did he say anything in that to indicate that you had said o him whether or not you were at the switch to turn the switch?
A. No.

Testimony of J. F. Raper.

J. F. RAPER, being duly sworn, testified for the defendant:

Q. You work for the Aluminum Company of America at Bauxite?
A. Yes.
Q. How old are you?
A. 25 years of age.
Q. How long have you been working out there?
A. About two years; close to two years.
Q. What were you doing last June? What kind of work were ou doing?
A. I was braking on the "dinky" last June; that is, with Mr. Ramsey on the "dinky."
Q. How long had you been at work braking on that train?
A. I believe I went to work about the first of May out there.
Q. How long had you been making runs to the Martin mine?
A. I believe we made a trip out there every month; a week's run ut there every month, I believe.
Q. Did you have several ways of handling the cars on runs to hat mine?
A. No, there was no difference in making a drop of the cars; ve just made a drop of them, you understand.
Q. How far was the end of the track from the Martin mine to the witch at that time?
A. About three-quarters of a mile, I suppose.
Q. Did you have rails laid that far?
A. Yes.
Q. Did the train run that far?
A. Yes.
Q. Take a string of cars out there when you load them up when ou bring them back, how would the string of cars be handled on n to the shed? Explain to the jury. Tell what you would do right along, and where you would be on the train, and where the engineer would be?
A. I would be on the rear of the train. I ride the rear end of the train on in; that is, to the switch. When we get

to the switch, there, of course, I turn the cars over to the switchmen.

Q. You were riding the rear end. Where would you pick up these switchmen?

A. We were supposed to pick them up at the switch.

Q. When the train came from the Martin mine, what signal would you give to the men in the shed to meet them?

A. I believe we used four blast- of the whistle for a call signal.

Q. Suppose they were delayed in getting out there, what would be done by the engineer?

A. We were supposed to tie up; that is, stop until they would make their arrival out there.

Q. How would the string of cars be handled? Who would uncouple the engine, and who would throw the switch? Explain how that was done?

A. They had two men to come out from the shed to handle this train on in. One of them was supposed to cut the engine aloose. The other was supposed to stay at the switch and turn the switch. The other man was supposed to come on up past the switch and cut the engine aloose. And then get on the train and ride it on down to the switch. The other man then was supposed to get on in my place and carry the cars on into the shed, and I was to get off at the switch.

Q. One of the switchmen from the shed pulled the pin?

A. He was supposed to.

Q. I will ask you if that was the custom in making that switch.

A. Yes.

Q. Do you know if it was followed by Ramsey at all except when this accident happened?

A. One time before only.

Q. When was that?

89 A. That was about 35 minutes, I suppose, before the time he was hurt.

A. That same morning?

A. Yes.

Q. Were those the only two times he pulled the pin for himself?

A. Yes, while I was working for him.

Q. How long before the accident had you been working for him continuously?

A. I went to work for him about the first of May, and this was about the middle of June, somewhere along there; probably about the 18th of June, along there somewhere.

Q. About a month and half that you had been working for him, the morning he was hurt was the only time he pulled the pin himself?

A. Yes.

Q. This morning when the accident happened, did Ramsey stop his train up there and wait for the men to come out from the shed?

A. No, the first run we made that morning we just rode right on down. He pulled the pin himself, and we just kept going, you

understand. He didn't stop; he just pulled the pin, and we kept going, drifting right on down.

Q. Was the switch thrown all right that first time?

A. Yes.

Q. Who was there, do you remember?

A. Jim Paris.

Q. And the cars went on into the shed a-l right the first time?

A. Yes.

Q. The second time, I will ask you if you saw Bob Page and S. S. McLaughlin? Do you know both of them?

A. Yes.

Q. When did you first see them with reference to the switch before this accident happened?

A. I saw Page in ahead of the engine coming meeting us;
90 I supposed 50 yards of the switch, coming meeting us. He was coming meeting us. The first time I noticed him he was about 50 yards, the best I could guess, from the switch. He was west of the switch; 50 yards west of it, when I noticed him.

Q. Was he walking or running?

A. He was running.

Q. Where did you next see him?

A. The next time I saw him he was on the cars setting up the brakes.

Q. What happened, if anything, to prevent your seeing between the time——

A. (Interrupting.) Of course, we were just drifting on straight track, and the engine was between Bob Page and I. We were then on the straight track, him coming up the straight track, and the engine betwen him and I.

Q. The next time you saw him he was on the cars setting the brakes?

A. Yes.

Q. How far was that from the switch when you saw him setting the brakes?

A. I would say he must have been 20 or 30 yards.

Q. Which way?

A. East of the switch.

Q. And was on the train?

A. Yes.

Q. Where was McLaughlin?

A. McLaughlin was on the train, but where he got on for sure, I could not say; somewhere east of the switch though.

Q. Was he on the left hand or right hand side?

A. He was on the left hand side of the track.

Q. From where you saw Page on the train, could he have possibly thrown the switch to let the string of cars into the shed and
91 have been where you saw him at the time you saw him?

A. I did not see hardly how he could. He would have to jump around a little bit. He was something like 30 yards east of

the switch when he got on the cars. He could not very well run down to the switch and then run back up there.

Q. You don't think it would have been possible?

A. I don't think so.

Cross-examination by Mr. ARMISTEAD:

Q. You state that when you first saw Page he was 50 yards west of the switch?

A. Yes.

Q. That is, he was between the switch and the mill?

A. Yes.

Q. What is the distance from the switch and the mill?

A. I never stepped the distance, but I suppose it is to be about 100 yards.

Q. So he was half way to the switch?

A. Yes.

Q. Had the whistle been blown then, the signal that the engineer gave for the switchmen to come out?

A. I could not say about that, whether it had or not?

Q. You don't remember?

A. I don't know whether it had or not. I could not make a safe statement to say that I did know.

Q. When you saw him 50 yards west of the switch, where was the train with reference to the switch?

A. We were 75 yards east of the switch, I guess, coming on down.

Q. How fast were you traveling?

A. I guess we*re* were going six or seven miles an hour.

Q. Had the pin been pulled then?

92 A. I could not say whether it had been pulled when I first saw Page or not.

Q. Do you know when the pin was pulled?

A. I know when it was pulled, but I don't know whether it was pulled before I saw Page or not.

Q. How far from the switch was the pin pulled?

A. About 40 yards, or 50 yards maybe, east of the switch.

Q. Where was Page when the pin was pulled?

A. I don't know. The engine was between Page and I when the pin was pulled. We were drifting down on straight track.

Q. Who pulled the pin?

A. Mr. Ramsey, the engineer.

Q. How many cars did you have on?

A. We had ten cars.

Q. Where were you on the train?

A. On the rear end.

Q. These are not box cars?

A. No.

Q. They are ore cars?

A. Yes.

Q. Where was McLaughlin?

A. At that time I didn't see McLaughlin.

Q. Where was he when you first saw him?
A. He was standing on the left hand side of the track. The head block comes in on the right hand side going west, you understand.
Q. You mean the head block of the switch?
A. Yes. McLaughlin was standing, to the best of my recollection, we will say 30 feet east of the head block on the south side.
Q. When you first saw him?
A. Yes.
Q. Where was the train then?
A. We were drifting on into the switch.
93 Q. How far from it?
A. There was one or two cars that had done gone in the switch; and done cleared the switch; going on in on the engine.
Q. Where was the engine then?
A. It was about 60 feet from the switch on the crossing there.
Q. When the pin was pulled, did the engine speed up and leave the train
A. It was supposed to. Yes.
Q. Did it do it?
A. Yes; it gained a little bit on the train.
Q. Where did Page board the train?
A. He boarded the train east of the switch.
Q. How far east of the switch?
A. I guess about five or six cars.
Q. How long were the cars?
A. They are about ten feet, I guess, clear.
Q. You say the cars are ten feet clear?
A. Three yards to the car.
Q. And ten cars?
A. Would be 30 yards.
Q. Where was McLaughlin when Page boarded the cars?
A. McLaughlin got on the cars after Page did. I saw McLaughlin get on the cars.
Q. How many cars back did Page get on?
A. He was about the fifth car from the head end, I suppose.
Q. How many cars back did McLaughlin get on?
A. He got on, I suppose, probably a car ahead of Page; some thing like that. He was right around him there somewhere: I could not say whether he was ahead or behind him.
Q. How long had Page been working there as switchman?
A. I could not say about that. I don't know how long.
Q. How long before this had he thrown this switch for this drop?

94–98 A. For making this run we making that time? This Martin mine run. I could not say whether he ever did it before or not.
Q. Do you know whether he did it before or not?
A. No.
Q. Do you know whether McLaughlin did it before or not?

A. No, I do not.
Q. Who did it before?
A. I don't know. They had another crew on there and Page and McLaughlin, to the best of my remembrance, was on there about three weeks.
Q. Had you ever seen Page throw that switch for those cars to drop in?
A. These cars, in making this run we were on then?
A. In making any run in?
A. Yes, I have.
Q. How often have you seen him throw that switch for cars to drop into the bins?
A. I could not say the number of times, but several.
Q. When he threw the switch for the cars to drop into the bins, had the engine taken the siding then?
A. Certainly, the engines would take the siding before he threw the switch.
Q. You had seen Page throw that switch before. You had seen him throw it before this accident?
A. Yes, but I won't say *say* I saw him throw it on this special run from this Martin mine.
Q. When ore cars were dropped into the bins, you have seen him throw it?
A. Yes, I have seen him throw it.
Q. You have seen him throw it the same way it should have been thrown this day on this trip.
A. Yes.

99 Q. Did you see where Page was when the engine passed him?
A. No. I don't know exactly the distance he was from the switch when the engine passed him.
Q. About how far?
A. I could not say, for I don't know.
Q. Did you ever throw that switch?
A. Yes.
Q. On what occasion did you throw it?
A. I didn't throw it on this run from the Martin mine, because it wasn't my duty to throw it.
Q. Whose duty was it to throw it?
A. It was the duty of the switchman from the mill to throw the switch.

Cross-examination continued by Mr. MEHAFFY:

Q. Mr. Loughborough asked you if it had been possible for Page to have run back after you saw him and throw the switch and gone back on the cars. You said you didn't think it was.
A. Not the distance from the head block that he was.
Q. But he could have thrown the switch and caught the cars when they got nearer to the switch. He passed the switch before the cars got to it?

A. No.

Q. I thought you said he cought the cars 30 yards east?

A. Page was east of the switch, but he passed the switch before the engine passed him.

Q. I understand that. He could have remained there at the switch and thrown it?

A. Yes.

Q. In other words, he did, in fact, pass right by the switch?

A. Yes; sure thing. He had to pass the switch.

Q. What you meant to say was, he could not have gone
100 down and thrown the switch and ran back and caught the cars where you saw him catch them.

A. No, I don't think he could. He could not have done that.

Q. He could have stayed there and thrown the switch?

A. I suppose he could have done that. I don't know about that but I know he could not possibly make this run up there and possibly go back to throw the switch.

Q. In other words, if he stayed down there and thrown the switch, he could not have gotten on the cars where you saw him get on.

A. No; if he had been on the switch, he could not have gone up there and caught the cars.

Q. It was his duty to throw the switch?

A. I don't know whether it was his duty *of* McLaughlin's.

Q. It was the duty of one of them?

A. That was the business, so far as I know, to help make this exchange of cars.

Q. You stated about pulling the pin, that one of them would pull the pin. So far as throwing the switch is concerned, it does not make any difference whether Ramsey pulled the pin or somebody else pulled the pin for him. The switch had to be thrown just the same?

A. Yes.

Q. After the pin was pulled and the engine passed the switch, the switch had to be thrown, no matter who pulled the pin.

A. The switch has to be thrown to allow the cars to go into the shed.

Q. After the engine passed the switch, somebody has got to throw the switch then?

A. Yes.

Q. It makes no sort of difference who pulls the pin. That would not alter it a particle?

A. That would not keep the switch from having to be thrown.

101 Redirect examination:

Q. You were asked about Page throwing the switch. I will ask you whether in the run from any other mine than the Martin mine, they ever had occasion to make a flying switch, that is, with the engine ahead of the cars?

A. There is the red ore mine on the side of this cut that goes to the Martin mine; and that widens out the cut going to the Martin mine; the track runs straight east and west. We had to back in there and pick up the cars they were loading out of this red ore mine,

come down and back up on the main line, and make a drop of th
to throw them into the shed. That was the only occasion, except
Martin mine, we had to make a drop.

Q. When you spoke of seeing Page make the switch, did you e
see him make a flying switch?

A. I saw him switching there. In fact, he broke there befor
did a few days.

Q. On what run?

A. I could not say.

Q. It wasn't from the Martin mine?

A. I don't think it was.

Q. You rode the back end of the train from the Martin mi

A. Yes.

Q. Why was that?

A. That was at the suggestion of Houston.

Q. For what reason?

A. For safety. We had a hill to climb from the Martin mi
It was about half a mile long, I suppose, and in case the cars wo
brake in *too* behind us, of course they would go back down hill a
probably run into the crew working down there, and probably
some one, or something like that. That was agreeable with he
I that I should ride the rear end of the train to prevent some
from getting hurt.

102 Q. Who directed the movement of the train of cars
ing those runs? Direct how they should be handled and
that?

A. Houston did.

Q. Who do you mean by Houston?

A. Ramsey. I got my orders from him. I suppose he was
conductor, and his suggestions were agreeable with me all ri
enough all the way through.

Q. He had control of the movement of the train and the engi
where it would go, when, etc.?

A. Yes.

Q. Dou you remember any occasion out there somewhere o
piece of track — would come down the track from gravity?

A. Yes.

Q. I mean the cars moving on the track without the engine
tached to them?

A. Yes. I don't know th[illegible] have ever known any to start w
out some release of some kin[illegible] release of the brakes or someth
like that, but they have got track there where the cars will start
gravity.

Q. If the brakes were released?

A. Yes.

On account of sickness, the case was continued over to Mon
morning, March 9th, 1908.

103 Having met pursuant to adjournment, the following
ceedings were had, to-wit:

Testimony of J. R. Gibbons.

J. R. GIBBONS, being duly sworn, testified for the defendant.

Q. Where do you live?
A. Bauxite.
Q. What is your occupation?
A. Superintendent of Mines for the Aluminum Company of America.
Q. What kind of plant have the- located at Bauxite?
A. They have a plant for grinding and drying bauxite and shipping it.
Q. What is bauxite?
A. It looks like clay, and is of various colors, white and red.
Q. Where do they get the bauxite? Out of the ground? Do they sink shafts, or get it from the surface?
A. They are what are called open cut mines; it is on top of the ground. They don't go under the ground.
Q. The plant consists of mills for grinding it and what else?
A. Grinding it and drying it.
Q. Do they treat the ore in every way?
A. No.
Q. How do they bring the ore to the mill from the different places?
A. It is brought in tram cars on the tram-road; a narrow gauge road.
Q. What plant has the Aluminum Company? What does it consist of?
A. Machinery for grinding the bauxite and drying it; apparatus for loading it into the cars; and also tram-ways into the mines for bringing it into the plant, 36 inch gauge road with little cars, about 1½ ton capacity.
Q. Is any bauxite brought into the plant in wagons in addition to the tram cars?
104 A. Not now. At one time it was hauled in wagons, but with the tram road, we have done away with that now.
Q. Does the tram road haul any passengers?
A. No.
Q. Does it haul any freight, or people pay to haul it?
A. No. Nothing but bauxite.
Q. What is the greatest length of any one tram road?
A. The greatest length in June was about 2800 feet, any one line was operated.
Q. Where did that line go to?
A. That line went out to what's known as the Martin mill dam.
Q. You say you are the general superintendent of the plant there and of the mines?
A. Yes.
Q. What position has Mr. Brazel?

A. He has charge of all hands outside of the office, I mean, an bringing the ore in and putting it into the cars.

Q. Who is Mr. Pipkin?

A. Mr. Pipkin is boss; what is known as the shed boss. He ha charge of the hands that attend to the crushing of the ore.

Q. Where does he stay?

A. He stays up around the crushers and handles the ore when i comes in.

Q. Inside the shed or outside?

A. Inside.

Q. Are any of his duties outside the shed?

A. No.

Q. Are you familiar with the situation of the tram tracks there or, at least, the situation they were in at the time of this acciden so that you could identify a blue print of it?

A. Yes, I think so. (Blue print handed to witness.)

105 (Mr. MEHAFFY:)

Q. Do you know who made this?

A. Our civil engineer, E. E. Sargent.

Q. Where is he?

A. The northern part of this State, about Clarksville now.

Q. Do you know anything about whether this has the prope separation or divergence of the tracks that is shown there?

A. Exactly.

Q. How do you know that?

A. Because it was made by an instrument.

Q. Did you make it?

A. No.

Q. How can you say that you know it then?

A. Because it looks just like it does on the ground, and he was sen there for the purpose of making it.

Q. And that's all the way you know it?

A. Yes.

Q. You never made any measurements?

A. No.

Q. It simply looks like it does on the ground?

A. Just exactly like it does on the ground.

(By Mr. ARMISTEAD:)

Q. Is there any scale to go with this?

A. If it does, it is down there in the lower corner.

Q. A scale of 1/20 of an inch to the foot?

A. Yes. It was taken from the regular plat of the road as ori ginally surveyed.

Direct examination continued:

Q. What is this track? (Indicating.)

106 A. Going to the Martin mill dam.

Q. What is this track coming down here? (Indicating.

A. The main line into the shed.

Q. What is done in the shed?

A. That's where the ore is crushed. The crusher stands under this track below it, and the cars are broken in the middle, and the ore dumped into the crusher below it.

Q. Is there a grade or is it level from back down here to the shed? (Indicating.)

A. There is one per cent grade; all of those tracks (indicating) are built on a one per cent grade leading to the shed.

Q. What is this track? (Indicating.)

A. That is known as the "empty" track. The cars that have been unloaded are thrown down on this track, and then taken on a grade to this point (indicating). The engine comes in here and takes them out. Takes them from here (indicating) and goes on out.

Q. In switching cars from the Martin mine into the shed, it has been testified that the engine would uncouple from them and let them drop in here. First, the engine would take this track, and then the cars would drop in here and go into the shed, the brakeman and switchmen being on the cars to control the brakes and keep them from doing harm in the shed. Describe what would be done with the cars there? What was done afterwards by the engine?

A. When the cars came into the shed, they would unload them here. As they would unload them, they would come to the space here and the cars above (indicating). The switchman who brought the cars in would run these cars down close, and unload the cars and when unloaded run them down on this track (indicating). A man put the cars there, put them out on this line (indicating).

Q. You say a man. You mean, of his own power?

A. Yes. He could run them easily. A boy could run them or push them out. It was down grade to here (indicating).

107 Q. What would the engine do after dropping these cars? (counsel marks the blue print, and hands to witness.) As I understand, the engine from the Martin mine with a string of loaded cars would come in on track A, it would be uncoupled from the cars and run in on to the track marked D, and the switch would be thrown and let the loaded cars take track C, and on into the shed. After they were unloaded in the shed, the cars would be pushed on down track C and on to track marked E and then pushed back by hand on to the other end on to the east end, or to the west end with reference to the compass, on track D, and put back at about the point marked "locomotive shed" for the engine to get and take back?

A. That's right.

Q. Then the engine would get the cars and take them back out for another load?

A. Yes the engine would go down and couple into them and take them to the mines, or go out the other track.

Q. The men that came from the shed and handled the brakes on the cars in the shed, what would be their work after they got into the shed?

A. To push the cars down close to the crusher and keep them close.

Q. After that work was done would they continue to push them on down the track here, or was that done by others?

A. They would sometimes help around if they had nothing else to do.

Q. What is the width between the rails of the track here?

A. 36½ inches.

Q. What is the size of the rails as compared with railroad rails?

A. These were 25 lb. rails at that time, and the ordinary rail was from 69 to 90 lbs.

(Objected to as the witness has not shown himself qualified to say what the ordinary rail is.)

108 Mr. MEHAFFY: It might be from 20 lbs. to 90 lbs.?
COURT: He can give the size of the rails there.

Q. Can you testify as to the weight of the ordinary rails?

A. From about 50 to 90 lbs.; Some of them 110 to 120 lbs.

(Mr. MEHAFFY:)

Q. On what?

A. On railroads; standard gauge railroads. I think Pennsylvania uses from 110 to 120 pounds.

Q. Will you get a section of that rail out there and exhibit to this jury?

A. Yes.

(The blue print hereto referred to is introduced in evidence by the defendant and is exhibit "B" to the bill of exceptions.)

Q. I exhibit to you a photograph of the engine with the train of tram cars. Look at it and state if it is correct?

A. That is correct.

Q. What is it? Is it the engine and are those the cars?

A. That shows the little "dinky" engine with the last 10 or 12 cars coupled on to it up at the switch.

Q. Is this the engine and the train that is in operation out there?

A. Yes.

Q. Is that the engine on which Ramsey was working at the time he was hurt?

A. It is.

Q. Are all of those cars used there alike?

A. No. We have three kinds of cars. We have cars like that which we use generally, and we have the side-dump cars.

Q. I mean, as to size?

A. Yes.

Q. Is this the kind of string of cars that was in the train when Mr. Ramsey was hurt?

A. Yes.

(Said photograph was marked "B" for identification) and
109 is attached to bill of exceptions as exhibit "C."

Q. Here is another view of the engine than the one just shown, which I have marked C. Describe what view of the engine that is.

Said photograph was introduced in evidence and is exhibit "D" to the bill of exceptions and attached hereto.

A. This is the engine showing the engineer off of the engine on the ground trying to poke his fire.
Q. Does this show the position of the cab?
A. Yes, and this is one of the cars.
Q. Who is that man there?
A. Mr. Lane, the engineer.
Q. Here is a photograph which I have marked D.
A. This shows the "dinky" engine with the engineer firing in the proper position.

Said photograph was introduced in evidence and is exhibit "E" to bill of exceptions and is attached hereto.

Q. Is that the same engine as shown in these other photographs, and is this the one on the rear of which Mr. Ramsey was hurt?
A. Yes.
Q. These photographs, do they correctly represent the situation as it appears to the eye?
A. They do.

(Said photographs are here introduced in evidence.)

Q. Did you make any measurements in regard to the cab of this engine, or see it done, so that you know what the dimentions are?
A. Not all of them. I know some of the dimensions.
Q. (Referring to photograph D.) That board this person is standing on, was that on the engine at the time of the accident?
A. It was.
Q. Do you know how far it is from the edge of this board to the boiler? (Referring to photograph D.)
A. Three feet.
Q. Do you know how wide this is? (Referring to board shown in photograph D.)
110 A. No.

(Mr. MEHAFFY:)

Q. In other words, you mean it is three feet wide?
A. Three feet deep.
Q. Is the seat on the right hand side?
A. Yes.
Q. Do you know how far it is from the seat in the cab to the hole in the coupling pin on the engine? (Referring to photograph C.)
A. About four feet.
Q. Do you know whether a person sitting on the seat in the cab could reach from the seat in the cab with one hand to the coupling pin and still retain his seat in the cab?
A. I don't think it is possible at all.

Q. I will ask you whether you saw any demonstration made as to whether it could be done? (Objected to).

A. I did.

Q. Have you a model of one of those cars?

A. I have.

Q. In the court room?

A. Down in the sheriff's office.

(Said model is produced and introduced in evidence). Is attached to bill of exceptions and marked exhibit "F" thereof.

Q. Is that a correct representation of one of those cars?

A. As near as a model could be made.

Q. Show how that breaks in two.

A. Standing on the track, when this is uncoupled underneath it falls in two and dumps the ore out. After it falls out, the car is heavy enough to come back itself.

Q. Referring to that blue print, there was a road crossing a little distance west of the switch where the accident happened. It was testified to by Mr. Ramsey, I believe, that this engine was standing on the road crossing at the time. Do you know the distance from the switch to that road crossing?

111 A. About eighty feet.

(Mr. MEHAFFY:)

Q. The road crossing is west of the switch?

A. Yes.

Q. In the conduct of the business there, who had control of the manner in which the switching was to be done?

A. The engineer in charge of the train.

(Cross-examination by Mr. MEHAFFY:)

Q. In what way did he have control of it?

A. He had charge of the making up of the train, taking it out and bringing it in, uncoupling it, etc.

Q. That is, the running of the train. You answered Mr. Loughborough that he had charge with reference to the switching?

A. He has.

Q. Did he have anything at all to do with that?

A. He directed the switch to be opened or closed whenever he went to go over it.

Q. Who did that?

A. His brakeman.

Q. What were these men sent out there that day for?

A. To bring in the train.

Q. Were they brakemen?

A. Brakemen to bring in the train.

Q. Had they been in the habit of throwing that switch?

A. Sometimes they did; not always.

Q. I didn't ask you if they did "always," but had not they been in the habit of it?

A. No.

Q. How do you know?

A. Because I knew sometimes they did and sometimes they did not.

Q. How do you know they were not in the habit of it? You wer-n't around there?

112 A. Sometimes I was.

Q. You wer-n't around there constantly?

A. It wasn't my business to be there constantly.

Q. You don't know then?

A. Yes.

Q. How do you know?

A. Because sometimes I have seen them throw it.

Q. You don't know but what they were in the habit of throwing it?

A. I know they threw it occasionally.

Q. In other words, you knew when you were out there that they did throw it?

A. Sometimes.

Q. It wasn't the duty of the engineer to throw it?

A. No.

Q. Did you ever know anybody else to throw it except the brakeman that was sent out?

A. His brakeman on the train.

Q. Did you ever know the other brakeman to throw it?

A. That is if it was his business.

Q. I didn't ask you that. Did you ever know him to do so?

A. Yes.

Q. He (Raper) rode on the rear end of the train?

A. Yes.

Q. And that was quite a distance back. At least, ten cars?

A. Ten cars back.

Q. How long are those cars?

A. About nine and a half feet.

Q. What do you mean?

A. In the clear. A car will occupy about 9½ feet on the track.

Q. What are the length of these platforms?

A. They are about two feet; long enough for a man to stand on and handle the cars.

113 Q. You mean from platform end to platform end?

A. No; I mean that the car will occupy that much, coupling and all; about 9½ feet.

Q. That's counting the space between the two cars when coupled?

A. Yes. We will say that ten cars will take up one hundred feet, but it won't quite take up one hundred feet.

Q. You say that road has 25 lb. rails?

A. That part of it has.

Q. What has it got now?

A. 25 lb. rails.

Q. It is the same?

A. Yes.

Q. Isn't that an incorporated railroad?

A. No.

Q. Not now?
A. No.
Q. You hav-n't an incorporated railroad there?
A. We have one, but that's the Bauxite & Northern Railroad Co., a different concern.
Q. Don't the cars run over all of it?
A. No.
Q. This is the narrow-gauge road?
A. Yes.
Q. This is operated by the Aluminum Company?
A. By the Aluminum Company of America.
Q. And that company is a corporation?
A. Yes.
Q. It is operated just as any other railroad is; that is to say, it has a steam engine. It is operated by steam?
A. Yes.
Q. And the engineer runs the engine and pulls the cars just as any other steam railroad?
114 A. Yes. The engineer has charge of the train.
Q. He has charge of the running of the train?
A. Yes, and the making up and the handling of it.
Q. What do you mean by saying he has charge of the making up?
A. Coupling up the cars and taking them out.
Q. He just couples up the cars that are to be taken out after the loads?
A. Yes; after the unloading and loading too.
Q. After they are unloaded he goes and gets them and takes them out with the engine and brings them back?
A. Yes.
Q. In operating the train he has nothing to do in coming back except to operate the engine?
A. Yes. He controls the engine, and he directs the engineer when to throw the switch or open it.
Q. The engineer?
A. His brakeman.
Q. He directs him when to throw the switch?
A. Yes, when he is to make a switch.
Q. At this switch, you say he stops the train. If they come and are there, there is no occasion to stop the train?
A. No, not if they are out there.
Q. But if he finds nobody there at all to throw the switch, then he has to stop?
A. Stop the train and wait until they come.
Q. But, if there is somebody there to throw the switch, then, it is his duty to go right on?
A. Yes.
Q. And it wouldn't be his duty to stop? What other photographs did you have taken besides these?
A. I don't know.
Q. You don't?

115 A. There is another one. I don't know whether I would recognize it if I saw it.

Q. You don't know that you would?

A. We had others taken, but I would not remember unless I saw them. If I saw them, I would recognize them.

Q. This is one of them? (Handing to witness.)

A. Yes, that is one of them.

Q. You had still others, you say?

A. I think I had.

Q. What does that represent?

A. Showing the proper position of the train. Here is the train coming in, and here is the engine on the siding. When he uncoupled his train and run down here, if he had waited for some one to get to the switch or waited for his brakeman to run down there and turn the switch for him when he passed the switch, it would have gone on this track instead of going on this one (indicating).

Q. I asked you what it represented?

A. I tried to explain. When the train come up here, if he waited for the brakeman to get on this engine and turn the——

Q. (Interrupting.) What does that represent? Does that represent the cars having taken the switch, or the cars on the other track?

A. The cars on this track coming down?

Q. I didn't ask you what would have happened if he did this or the other. What does that represent?

Mr. G. B. Rose: It represents the engine on track D.

A. Yes.

(Mr. Rose:)

Q. And the cars on track A.

A. It had not taken the switch.

Q. That represents the engine having taken the proper track, and the cars are here?

A. On the proper track.

116 Q. On the track that the whole thing come down on?

A. Yes.

Q. Whether that took the proper track down here or not depends entirely upon whether the switch is thrown?

A. Yes.

(Said photograph is introduced in evidence by plaintiff and marked exhibit E.) is attached to bill of exceptions and marked exhibit "G" thereto.

Q. What was Brazzel's business?

A. He was to superintend the mining and bringing in of the ore, crushing it and putting it into the cars.

Q. What would be the general boss around there?

A. Yes.

Q. He had charge and supervision over Ramsey?

A. Yes.

Q. And over Page?

A. Yes. Page was under no boss; of course he directed——

Q. (Interrupting.) He was under Brazzel?

A. All of them were under him in a way.
Q. He was their general boss?
A. Yes.
Q. Didn't they all have to follow his directions?
A. No, because he gave directions to the boss. Really a man has no right to give instructions to the men that work for any one else. He must give his instructions to the boss.
Q. Aren't they still his instructions, whether he gives them directly or through somebody else?
A. Yes, they come to him.
Q. Then, they get Brazzel's instructions, although given to the men through another boss.
A. Yes. You can put it that way.
117 Q. I don't want to put it that way unless that's true. Is it true?
A. They work through his instructions; through his boss, of course.
Q. That's what I asked you, if they were under Brazzel's instructions?
A. Yes.
Q. You say they were?
A. Yes. A distinction can be made in that. There is a difference in there.
Q. What is the distinction?
A. I have no right to go to one of my hands and correct him at all.
Q. Is that the distinction you are talking about?
A. Yes. I go to the boss when he don't work right. I don't go to him. I hold the boss responsible for his work.
Q. You mean you do go to the boss and that you don't go to the men. Don't you know that you, as general superintendent there, could go to the men and discharge them if you wanted to?
A. Yes. I had the right, but never did. It is not my business to do it.
Q. What you mean is, not that you have no right to do so, but that's not your manner of doing it?
A. That's not the policy. That's not the way the business is done at all.
Q. The business is done by going to the boss and giving him instructions, and he gives them to the men?
A. Yes.
Q. So, in that sense Brazzel was over the whole "shooting-match" was he not?
A. Of course, they worked under his general instructions.
Q. He gave instructions to the bosses?
118 A. Yes.
Q. And they to the men?
A. Yes.
Q. That was true with all the men there?
A. Yes.
Q. With Ramsey, Page, McLaughlin and Raper?

A. Ramsey worked under him.
Q. But they all worked for the same company?
A. Yes, of course.
Q. Page was an employé of that company at the time of the injury?
A. Yes.
Q. And McLaughlin was?
A. Yes.
Q. And Raper was?
A. Yes.
Q. And those three, you say, had a boss between them and Brazzel?
A. Yes.
Q. Who was it?
A. Pipkin. Did you ask me if Raper worked under that man? He did not, because he was the brakeman on the train and worked under Ramsey.
Q. Well, he worked under Brazzel?
A. Yes, just as Ramsey did.
Q. What were these boys sent out there for?
A. To bring in the cars.
Q. What was the whistle blown for?
A. To notify them to come for the cars.
Q. Why would they stop?
A. Why would who stop?
Q. Why would the train be stopped when it whistled?
119 A. To wait for these men to come out and take the cars in.
Q. Didn't it wait for them to come out and throw the switch?
A. No.
Q. It would wait for them to come and take the cars in?
A. Yes.
Q. That was the only purpose of their stopping?
A. That was their duty, to take the cars in; get on the cars and take them in.
Q. Wasn't it their duty to throw the switch?
A. Sometimes they would throw the switch when the engineer would not stop to let his brakeman come on in front and throw it.
Q. I didn't ask you that. Wasn't it their duty to throw it?
A. I am telling what they did.
Q. You are not answering my question. Wasn't it their duty to throw the switch?
A. No; it was really the brakeman's duty to always throw the switch.
Q. They were brakemen?
A. But they were only to take the cars in.
Q. When were they to take them? Before or after they got on the shed track?
A. They were to get on before they got on the switch.
Q. Would the brakes at that place stop the cars easily?
A. Yes; they could stop them in two or three minutes.

Q. At what distance?
A. In, say 40 or 50 yards.
Q. How far is it from the switch down to the shed?
A. It is about 200 feet.
Q. Of course, I assume that it would depend upon the speed o the cars as to when they could stop them.
A. The speed of the cars, the number of brakemen upon it an whether or not the track was wet or dry.
120 Q. What was the condition that morning at the time o this accident?
A. The track wasn't wet that morning at all.
Q. It was dry, then?
A. I think so.
Q. You were not present yourself?
A. No.
Q. You know nothing about the speed of the cars nor the oper tion of the train, nor where the boys were or anything about it?
A. No.
Q. How do you know anything about the weight *or* rails on rai roads here?
A. Because I have been reading a little, and the last forty yea I have traveled a little and seen something.
Q. Is that all you know about it. You are not telling what yo know about it yourself, but from what you have read and hear about it?
A. I have had a little experience of my own.
Q. In weighing them?
A. No, in building railroads.
Q. Where?
A. In Arkansas.
Q. Down here at Bauxite?
A. Yes.
Q. Have you ever built any anywheres else?
A. No.
Q. From this little experience you have had, that's all you kno except what you have read and heard?
A. Yes.
Q. You don't know except from hearsay about the Pennsylvani road?
A. No. I have traveled on several branches of the Pennsylvani road.
121 Q. You mean you could tell by that the weight of th rails?
A. I could see the size of the rails.
Q. Could you tell what its weight was?
A. Approximately.
Q. What did you say the weight of the ordinary rail in railroad in Arkansas was?
A. Your road has only 70 lb. rails. That's the reason you hav so many accidents.
Q. You think that is really the reason?

A. I think so.

Q. Don't you know as the absolute truth that it has fewer accidents than any road in the country?

A. I don't know.

Q. That it runs more trains on a single track than any other road in the country?

A. I know the larger the rail the safer the track.

Q. Don't you know it runs more trains on a single track than any other road in the country?

A. I am not prepared to answer.

Q. How do you know it has more accidents?

A. It seems so, than any road I know of, except the Southern.

Q. How do you get that? From hearsay, or were you present?

A. The newspapers, and the amount of business you have to attend to.

Q. How many miles of road are there in Arkansas?

A. I don't know.

Q. Do you know there is about six times as any other road?

A. Of your road? I don't know the amount of yours.

Q. You don't know anything about the business?

A. Except you have a great many accidents.

Q. Don't all the roads?

A. Yes, they have some.

122 Q. Other roads have some, but we have a great many?

A. It seems so.

Q. So the rails are 70 lbs., and that's the reason for it?

A. I think that makes a less safer road.

Q. What's the weight of the Cotton Belt?

A. I don't know what they are running.

Q. How could you tell we have smaller rails than the Cotton Belt rails, if you don't know anything about what kind they have?

A. The larger rails it takes in order to make the road bed safer.

Q. What's the weight of the Rock Island rails?

A. I think they have about 65 or 70 lbs.

Q. Your statement to the jury is that we have 70 lb. rails, and the other two roads have smaller rails, and because they have smaller rails, we have more accidents than any body else. Is that so?

A. I don't know what they have.

Q. That's what you said?

A. I say the larger rails makes a safer road.

Q. Haven't we got larger rails than any other road in the country?

A. No.

Q. What other road?

A. The Bauxite & Northern.

Q. I mean, of course, to except your road. Hasn't the Iron Mountain got larger rails than any of these other railroads?

A. I don't know that to be true.

Q. What on earth do you mean by saying we have smaller rails, and, therefore, we have more accidents?

A. I mean this; the larger the rail used on a road the safer th track or road-bed is.

Q. You don't happen to have accidents?

A. No, because I am running a small engine in proportion. I an not running a locomotive engine in a standard gauge road.

123 Q. Don't you know of railroads in the country in Ar kansas having 35 lb. rails?

A. I do not.

Q. You don't know what they are?

A. No; I don't know any of them running 35 lbs.

Q. You don't know what they are running?

A. I don't know what they are all running.

Q. You don't know what any are running except the Iron Moun tain?

A. No, really.

Q. When you testified about the Arkansas rails, isn't it true tha you don't know anything about it?

A. I didn't testify about the Arkansas rails but roads generally railroads; standard, first class roads. When you asked about rail roads, I am talking about first class roads.

Q. I thought you were talking about rails in Arkansas?

A. No.

Q. What size has the Southern? You say accidents are caused by small rails?

A. They have only got about 70 or 80 lb. rails.

Q. What makes you think that?

A. I have been over it frequently. I ride over it about once a month.

Q. They have pretty near as many accidents as the Iron Moun tain?

A. No. More, possibly.

Q. Yet, they have the same sized rails. In coming from tha mine in there and putting these cars in as they were on the occasion of this injury, that was the only way to put them in?

A. Yes.

Q. What grade did you say that was? (Indicating.)

A. About one per cent. One to one and a quarter.

Q. Going west?

A. Yes.

124 Q. In going from the shed east is about one per cent t a certain place.

A. Yes, and then it was from one to two per cent down grade.

Q. Where you say the cars would be pushed out east, there is down grade?

A. Yes.

Q. And they are pushed out to a level, or to the end of the down grade, and the cars would stop there, and the engine would go in there and get them?

A. Yes.

Q. How long had Ramsey been at work at this engine, do you know?

A. I don't know the time; some three or four months.

Q. You have shown on this photograph a person firing the engine. I believe you said, properly. Did you ever fire an engine?

A. No.

Q. You haven't shown anybody there getting out clinkers, as he was at this time?

A. The old man on there could be getting the clinkers out. That's the only place for him to stand.

Q. He could not stand down on the ground like the other picture shows, as well?

A. He could not while standing on the ground get the clinkers out?

Q. He could not.

A. No. The fire box would be above his head; it would be too high.

Q. Aren't you mistaken about that?

A. No.

Q. You don't mean that the fire box would be above his head?

A. To reach in here (indicating). The fire box comes way down about here. He could not reach the fire box as well as in this
125 position was up here (indicating).

Q. Doesn't that photograph show the man doing that very thing?

A. No, because he is going level in. The fire box comes way down about here (indicating).

Q. Why not have him doing that?

A. Because I wanted to have him in the position Ramsey was when he got hurt.

Q. If Ramsey was in the position doing what he said he was doing, why not take a picture showing that man was in his position?

A. He was in the position throwing coal in.

Q. And that's what Ramsey was doing?

A. I don't know what Ramsey was doing.

Q. At any rate, this photograph was taken to represent Ramsey at the time of the injury?

A. Yes.

Q. When you said the fire box would be way above his head, you were not mistaken?

A. No. No man can stand on the ground and reach the front end of the fire box.

Q. Where is the fire box?

A. Down under here (indicating). The door comes way up this way (indicating).

Q. You still don't mean the fire box would be above his head?

A. The poker would be. He would have to hold the poker way above his head to get to the bottom of the fire box. He could not reach up.

Q. How high is this platform from the ground? What is th height of the sill, I mean?

A. About two feet.

Q. How far is it from the platform to the door?

A. One foot.

Q. So then, standing on the ground, the opening would be jus three feet up?

126 A. No, because the fire box is higher. The door to th fire box is higher.

Q. I asked you if the door wasn't just a foot up. I thought yo said this was a foot up (indicating).

A. I don't know the distance the fire box is here (indicating).

Q. Don't you know the distance of the door?

A. No, I don't remember that.

Q. What you mean was, this board was about a foot up.

A. No, about two feet. A foot above the coupling.

Q. Isn't the opening less than a foot above that board?

A. I don't think so. I know it is so a man can't rake that; h can't rake the front end of the fire box from the ground.

Q. You are positive about that as anything else you have testifie to?

A. I am positive you can't rake the front end of the fire box fro the ground.

Q. You say that board is three feet wide?

A. No, I say that board is one foot, and two feet from the boar into the fire box out to the edge of that board. Can I explain that you?

Q. Yes. The last question I asked you was, if this board wa three feet deep, as you call it. Didn't you testify in your direc examination that this board was three feet deep?

A. No, I did not.

Q. It is just one foot.

A. 2 x 12, and two feet from the inside edge of this board to th fire box, making three feet from the fire *fire* box to here (indica ing).

Q. So that board is one foot wide?

A. Yes.

Q. A man standing up there like that would be on the foot boar right by the fire?

127 A. No, because it is two feet from the inside of the boar to the fire box.

Q. I know, but he would be right by the fire box. In oth words, just a foot to stand on?

A. No, three feet to stand on.

Q. If he were inside the cab?

A. That's where he is supposed to be.

Q. There is two feet from the inside of the cab to the fire box?

A. Yes, and that board on there is three feet. A man standin on the ground has got to be two feet below that or more and reac over that three feet; reach two feet up and three feet in to get to th fire box and reach down underneath.

Q. Your idea is that he could not do that?
A. No.

Cross-examination continued by Mr. ARMISTEAD:

Q. This photograph marked D represents a man in the cab using a shovel?
A. I don't remember whether he is using a shovel or poker. Let me see. (Examines photograph.) I can't tell whether that is a shovel or poker, but I think a shovel.
Q. A shovel would be used to coal the engine?
A. Yes.
Q. What would you ordinarily use in removing clinkers?
A. He would use a rake.
Q. That is, a clinker hook?
A. Yes.
Q. To do that, he would have to thrust the clinker hook into all parts of the fire?
A. Yes, down to the grates.
Q. To remove the clinkers from the grate bars?
A. Yes.
128 Q. So that the fire would draw?
A. Yes.
Q. If he stood on this platform and thrust that clinker hook into the grates, the clinker hook would get very hot, the part that he would have to handle.
A. It might get hot if he kept it in too long.
Q. About how long is a clinker hook?
A. About five feet.
Q. So that in order to remove those clinkers from the grate bars with a five-foot clinker hook, standing in a position where he could handle the cool end of it, he would have to stand on the ground behind the engine?
A. No, not at all.
Q. Have you ever made an experiment to see whether or not what I have stated is true? Have you ever seen them make an effort to remove the clinkers from the grate, standing on this board, with the clinker hook?
A. I won't say I have, but that is the customary way this was done, and the only way.
Q. When you say it is the custom, on what do you base your statement? On some personal knowledge of yours, or something somebody has told you?
A. Because it is the only way to do. When the train is running, he cannot step to the ground and clean the clinkers.
Q. This train wasn't running. It was standing still when Ramsey was standing on the ground when he was removing the clinkers. That is true?
A. Yes.
Q. You heard that?
A. Yes.

Q. It was necessary for him to remove the clinkers in order to get a hot fire.

129 A. I don't know. I wasn't there. I could not swear to that at all.

Q. It would ordinarily be necessary?

A. I don't know. It might have been necessary, and it might not. I can't tell. I can't give that as testimony.

Q. So that when you state what the custom is, it is not the custom for the engineer on this train to rake the fire by cleaning the grates when the train is in motion?

A. Any time he can do it; just as well as any other time.

Q. Do you state that just because you are trying to force a conclusion, or state it from any knowledge that he can remove these clinkers as well standing on that platform as on the ground?

A. The engineer is supposed to get on the engine, look after the engine, fire the engine and remove the clinkers while it is running.

Q. He never gets on the ground?

A. Except to empty the ash box.

Q. Nothing else?

A. Or to oil it up, or something like that.

Q. You are just testifying as to your conclusions. You haven't been an engineer on this train?

A. No.

Q. You don't watch the engineer on this "dinky"?

A. I try to.

Q. You have other things to do?

A. Yes.

Q. Did you frequently see him remove clinkers when the engine was standing still?

A. I never did.

Q. So then, you have merely stated your conclusions?

A. No; that's a provision made for the handling of the engine, just as I know provision is made for blowing the whistle or

130 oiling it or anything else.

Q. What provision is made?

A. He has a clinker hook there so he can stir his clinkers whenever he needs it; his going a long distance, and his fire needs poking, and needs the clinker hook to remove the clinkers, he can do it while running. He doesn't have to stop.

Q. You mean to say he could rake the clinkers out, remove them from the grate, while that engine was in motion, standing on this foot plank?

A. I do.

Q. You have stated that the switching crew and the brakeman were under the control of the engineer?

A. I stated his brakeman was.

Q. You don't mean to be understood as saying that the switchmen, McLaughlin and Page, were under the control of Ramsey?

A. No. They would sometime turn the switch for him, but it was his business to have a switchman to do that.

Q. You heard Raper testify here the other day?
A. Yes.
Q. Did you hear him say it was the duty of these two switchmen, when they came out, one of them to throw the switch, and one to get on the train and ride the cars in?
A. Sometimes they did it, but it wasn't their duty.
Q. Who defined their duties to them?
A. To these men? Pipkin told them to go and bring the cars in; their boss.
Q. On that particular day?
A. All the time.
Q. Were you present when Pipkin instructed these men as to their duties in connection with the operation of that train?
A. No.
Q. Did you ever hear him instruct them?
131 A. No.
Q. How do you know, then, that he so instructed them?
A. Because it was his business to do so, and they performed it every day.
Q. You state it was their duty to do it because it was Pipkin's business to tell them it was their duty to do it?
A. Yes. We told them that it was their duty, and they always knew when once told. When a man is told to do a thing he must do it every day until he is told to do something else.
Q. Your statement that it was the duty of these switchmen to ride the cars in, and not throw the switch, is merely a conclusion based on your assumption that it was proper for Mr. Pipkin to tell them. Isn't that true?
A. State that again.
Q. I asked you if you ever heard Mr. Pipkin tell these men it was their duty to ride those cars in and not throw the switch?
A. Yes.
Q. You stated that you did not hear him instruct them?
A. Yes.
Q. But it was his business to so instruct them?
A. Yes.
Q. And, therefore, it was their duty?
A. Yes.
Q. You don't know that he did so instruct them?
A. They performed their duties.
Q. But you don't know that he did?
A. I know that the duty was performed.
Q. What duty?
A. To go out and get the cars and bring them in.
Q. Do you know it from the fact that they never threw the switch?
A. No.
132 Q. You know they went out and rode the cars in?
A. Yes.
Q. Therefore, it was their duty to ride the cars in?
A. Yes.

Q. You know they made a custom of throwing the switch?
A. No.
Q. Don't you know they were instructed by Pipkin to go and throw the switch?
A. No.
Q. Your statement of their duties is merely based upon your idea of what it was Mr. Pipkin's business to tell them?
A. Yes.
Q. And that's all you know about it?
A. Yes.

Redirect examination:

Q. Did Mr. Pipkin ever leave the mill or attempt to supervise how that switching should be done there?
A. No.
Q. Who had control and charge of the methods to be used to switch those cars into the shed and clear the engine of the track; that is, who directed the switch should be made, how it should be thrown, and the engine should be uncoupled and coupled from the cars?
A. The engineer.
Q. Was he in charge of the operation of that train and the switching of the cars?

(Objected to.)

A. Yes; so far as making up his train and uncoupling and coupling up, and making switches, etc., is concerned.
Q. The duty of Pipkin was to send men out then to meet the train?
A. Yes.
Q. It wasn't his duty at all to supervise how the switching was done?

(Objected to.)

133 A. No.
Q. So it was the duty of Ramsey, when the men got out there, to direct how the switching should be done?
A. Yes.
Q. In regard to the use of the clinker hook, I will ask you whether you looked at this engine and the clinker hook since the accident to ascertain by demonstration whether the clinker hook could be used by a person standing in the cab on the engine?
A. Yes.
Q. With that facility *it could* be used from that position. I will ask you if the clinker hook could be used, as a result of that demonstration, by a person standing on the platform, if he had room to handle it, etc.?
A. Certainly he has.
Q. In regard to its getting hot, I will ask you whether he would have to catch with one hand further down the bar standing on the ground than he would have to standing up in the cab?

A. Not a bit.
Q. In other words, could he catch hold of the bar as well with th hands standing in the cab as standing on the ground?
A. Just as well.
Q. So, if the bar was hot, it would be just as hot to his hands ile standing in the cab and using it as while on the ground. Is t right?
A. Yes.
Q. The tram road out there, there has been a discussion as to its tus. It does not haul passengers or freight for the public?
A. No.
Q. The cars just handle this bauxite or clay-like stuff and bring rom the mines?
A. Yes, and dirt.
Q. And that's all the tram-way is used for?
A. Yes.
Q. Does the Aluminum Company of America own or oper- any line of railroad?
A. No, not in Arkansas.
Q. It just consists of the mines and plant there, and brings the from the mines to the plant on this tram?
A. Yes.

Recross-examination by Mr. MEHAFFY:

Q. You said it don't operate any railroad in Arkansas?
A. The Aluminum Company of America does not.
Q. Where does it operate its railroad?
A. In New York.
Q. Doesn't it operate that other road. Of course, it is a separate poration, but isn't it owned by the Aluminum Company?
A. No, a different road altogether.
Q. Isn't it the same people?
A. The same people own stock in it.
Q. That is to say, the same people own the Aluminum Company t own that other railroad?
A. There are persons who own stock in the Bauxite & Northern o don't own stock in the Aluminum Company.
Q. But it is the Bauxite people that own practically all of that uxite railroad?
A. Yes.

Testimony of J. L. Paris.

J. L. PARIS, being duly sworn, testified for the defendant:

Q. Where do you live?
A. At Cabot now.
Q. What are you doing up there?
A. I haven't been doing anything; farming a little.
Q. Are you living with your folks?
A. Yes.

Q. Are you connected with this Aluminum Company at all?
A. No.
Q. Were you employed by them at one time?
A. Yes.
Q. What were you employed to do?
A. Most anything they wanted me to do.
Q. Were you at work for the Aluminum Company about June 18th 1907, at about the time Mr. Ramsey was hurt there?
A. Yes.
Q. What work were you doing there?
A. I was riding cars, my regular job.
Q. Was Mr. Ramsey engineer of the engine at that time?
A. Yes.
Q. Was that before he was hurt or afterwards?
A. It was at the time he was hurt. I worked there before and after.
Q. How long had you been working there before he was hurt?
A. I had been working for the company right smart while, but I had not been working at this job but about a month.
Q. About a month at this riding the cars?
A. Yes.
Q. Just state to the jury how that would be done when the cars would come in from the Martin mine. What would be done there? Describe what would be done when you would first start that train?
What would you do from the time you left with the train
136 until you got the cars in the shed?
A. Pulling in from the Martin mine? There were two of us working in the shed; we would go out and get the cars, and one of us was to stop at the switch and throw the switch, and the other one would go up and meet the train and ride it in, while the engine made the drop.
Q. When the train would come in towards the shed, would they give you any signal that they were coming?
A. They would call us; they would blow the call whistle.
Q. What would they do? Come on in or stop and wait for you until you got out there?
A. They would stop and wait until we got there.
Q. Was Mr. Ramsey expected to stop and wait for you to come there?
A. I suppose so. Yes.
Q. Did he do it?
A. He did all the time. He had to; the cars could not come in by themselves.
Q. When you would get to this train, what would you do? Where would you get on the train, and what would you do after getting there? I mean, when it would stop and wait for you to arrive?
A. Go and get on it and ride the cars into the shed.
Q. Who would pull the coupling pin from the end of the cars?
A. One of the men that would go out to the train.
Q. What would he do after pulling the coupling pin?

A. He would ride on down the switch on the engine and throw the switch and then catch the cars as they come by.

Q. You mean, get off the engine when he got to the switch?

A. Yes; drop off and throw the switch and step back on the cars.

Q. Did you ride one string of cars that *same* from the Martin mine on the day before Ramsey was hurt? I mean, before he was hurt?

A. The morning before he was hurt I did.

137 Q. That same morning?

A. The same morning he got hurt.

Q. How was that string of cars handled? What did he do there? Who pulled the pin for the switch?

A. I don't know who pulled it that first trip.

Q. What did you see of the switching of these cars?

A. I didn't see anything more than I throwed the switch and rode the cars into the shed.

Q. Did the cars stop and wait for you that morning to get out there?

A. Yes; he was waiting for us.

Q. Where did you stop after you started out there?

A. At the switch.

Q. Was anybody from the shed on the train to pull the pin that time?

A. Nobody on the train but the brakeman.

Q. The brakeman to Mr. Ramsey, I suppose?

A. Yes.

Q. You waited at the switch?

A. Yes, until the cars came by.

Q. You threw it?

A. Yes.

Q. Had you ever known of Mr. Ramsey's pulling the pin before on that run, if he pulled the pin?

A. No, I don't think I ever did.

Q. Who instructed you when you went to work there first how to uncouple that train and throw the switch so as to let the cars into the shed and the engine go by?

A. On that run, Mr. Ramsey and his brakeman.

Q. Who was his brakeman?

A. Forrest Raper.

Q. Did they explain to you how it should be done?

138 A. Yes.

Q. Was that when you first went to work there, when you first commenced to do that work?

A. Yes. From the Martin mine.

Q. It was handled differently from other mines?

A. Yes.

Q. You didn't see anything of the accident?

A. No.

Cross-examination by Mr. MEHAFFY:

Q. How many times had you been out there handling cars from the Martin mine for Mr. Ramsey?

A. I don't know how many times; every time they ran out from the Martin mine.

Q. A half dozen or something like that?

A. I guess; probably more.

Q. He would stop for you when you weren't out there?

A. Yes.

Q. That was the only reason for making the stops because you would not be out there from the shed?

A. That was one reason he would have to stop; he would have to stop there until we got there ready to board the cars.

Q. But if you were there already, there was no occasion to stop?

A. No.

Q. Two of you would come from the shed?

A. Yes.

Q. It would be the duty of one of you to throw the switch?

A. Yes.

Q. And the other would ride the cars in?

A. Not all the way in; ride the cars just when we threw the switch.

Q. You rode them into the shed?

139 A. Yes.

Q. You caught them after you threw the switch and rode them in?

A. Yes.

Q. But the other party would catch them before that?

A. Yes.

Q. That was the duty of these two persons that came from the shed all the time, coming from the Martin mines?

A. Yes.

Q. So that when Mr. Ramsey would come there and you would not be there, he would blow the call for you and wait until you get there?

A. Yes.

Q. Then, one of you would go to the train, and the other would throw the switch?

—. —.

Q. But if he was already there, as he was, he pulled the pin himself that morning?

A. I didn't see him.

Q. I know you didn't, but you say there was nobody on the train but him and the brakeman?

A. That morning, I don't know who pulled the pin, he or his brakeman.

Q. It wasn't pulled by one of you boys that came from the shed?

A. No.

Q. The pin was pulled, and the engine went on the proper track, and you threw the switch and the cars took the other track?

A. Yes.

Q. Just this very time you wasn't there?
A. No.
Q. No matter who pulled the pin this second time it was the duty of one of these parties that came there, after the engine went on the one track, to throw the switch?
A. Yes.
140 Q. If he was already there, there would be no occasion to wait for him?
A. No.
Q. But it would be his duty to throw the switch and see to it that the cars took the other track?
A. Yes.
Q. Nobody else was assigned this duty at all but the two men that came from the shed?
A. That's all; the brakeman, if he was at the head-end of the train.
Q. But these two men were assigned especially to that duty?
A. Yes.
Q. The brakeman, as a matter of fact, rode on the rear end for the purpose of protecting the cars?
A. Yes.
Q. He could not get there very well and do it.
A. No, unless he would leave his train and go on up to the head.
Q. But, at any rate, he didn't do it. As a rule, the boys from the shed did that?
A. Yes.
Q. Who did you work under?
A. Pipkin.
Q. Was he in the shed with you?
A. Yes.
Q. Did he instruct you that it was your duty to go out there and meet the train and do as you have described?
A. No, he never did give us them.
Q. How did you know how to do?
A. I knew that was my job.
Q. How did you know it?
A. Yes; he instructed me to go out there.
Q. He had done that when you took the job.
141 A. He instructed me that was my job, to go after these loaded cars.
Q. Was that all the instructions he gave you?
A. All what work I had to do in the shed.
Q. I am not talking about your work in the shed. You knew it was your duty to go out there and throw that switch and ride the cars in?
A. Yes.
Q. Who told you that was your duty?
A. Mr. Ramsey and the brakeman.
Q. They told you that was your duty?
A. Yes.

Q. And you understood that?
A. Yes.
Q. Did Mr. Pipkin tell you Mr. Ramsey would tell you how to do it?
A. No.
Q. How did you know it? He told you to go out there?
A. He told me to go out there and bring the loaded cars in. These train men understood that's the way they worked it; the way they handled it.
Q. Then, you were informed that was the way they handled it?
A. Yes.
Q. How long did you work there after the accident?
A. Until they shut down there a while back.
Q. Where were you at the time of the accident?
A. Working in the shed that day in another fellow's place.
Q. It wasn't your duty at this particular time to meet this train?
A. No; I wasn't on that job that day at all.

Cross-examination continued by Mr. ARMISTEAD:

Q. Did you tell Ramsey that morning when you switched for him that the next time he came Page would switch for him?
142 A. I don't remember whether I did or not.
Q. Why didn't you switch for him the next time?
A. I had to work in the shed.
Q. Who sent Page out?
A. Mr. Pipkin, I suppose. He was foreman.
Q. Do you know that he did?
A. No.
Q. Did Mr. Pipkin set you about something else?
A. Yes.
Q. When he did that, did he tell you who would do the switching the next time?
A. He didn't say who he would sent with Mr. Page, but Mr. Page was with me that day. He was at work with me on the job all the time.
Q. He saw you go out there and throw the switch that morning?
A. I don't know that he saw me.
Q. Did he go out with you?
A. No.
Q. Page?
A. No. He wasn't with me that morning. He was doing something else.
Q. How did you know you wasn't to throw the switch the next time?
A. I was working in the shed that day, and we ran out of ore, and I walked on up and met these fellows and brought the train in.
Q. Who told you to go?
A. No one told me to go.
Q. Did you go in answer to the whistle?
A. Yes.
Q. Why didn't you go in answer to the whistle the second time?

A. I was working. I had work to do in the shed. It was not my place to go this last time. That was after Mr. Pipkin told
143 me he wanted me to work in the shed.

Q. He put you about something else?

A. Yes.

Q. Did he just tell you not to answer the whistle the second time?

A. He didn't tell me not to, but I knew it wasn't my place to do in answer to it.

Q. You altogether was under the control of Mr. Pipkin?

A. Yes.

Q. You looked to him for authority?

A. Yes.

Q. He directed your movements?

A. Yes.

Q. And Page's?

A. Yes.

Q. And McLaughlin's?

A. Yes.

Q. And Raper's?

A. Yes.

Q. And Ramsey's?

A. Yes. I don't know that he kept Mr. Ramsey's time.

Redirect examination:

Q. What was Mr. Pipkin's place? Where did he stay, and what work did he supervise?

A. He was shed foreman; he stayed in the shed.

Q. Did he supervise any of the work done outside the shed, the mining or anything of that sort?

A. No.

Q. You say you worked at the switch, running the cars in the shed, about a month before the accident?

A. Yes.

144 Q. Did you work every day, or nearly every day?

A. Yes, pretty well all the time.

Q. About how many trips a day would you make? I mean from the Martin mines?

A. I don't know just how many they would make. Eight to ten; something like that.

Q. That many a day?

A. Yes.

Q. So, you made eight or ten trips a day for a month?

A. Yes.

Q. Working with Mr. Ramsey?

A. Yes.

Q. I don't know whether I got a definite answer from your testimony as to the custom about the handling of those cars under Mr. Ramsey, whether, when you both left the shed, one of you would stop at the switch on your way to the train and the other one would go down and uncouple the engine and ride to the switch, or whether both of you would go to meet the train and one of you got on the

engine and uncoupled it and dropped off the engine at the switch and turned the switch. How was that?

A. Sometimes one of us would stop at the switch and stay there; didn't want to go down to the train, but stay there and throw the switch. The other would go on and pull the pin and ride the train on in. Again, both of us would go down on the train, one get on the engine and pull the pin and step off at the switch and throw it, and the other one stay on.

Q. You mean both ways?

A. Yes.

145 *Testimony of C. H. Brotherton.*

C. H. BROTHERTON, being duly sworn, testified for the defendant:

Q. Where do you live?

A. Bauxite.

Q. What do you do there? Who do you work for?

A. For Mr. Brazzel. I have been for two or three years, I guess.

Q. Are you working for the Aluminum Company there now?

A. Yes.

Q. Did you ever work as brakeman on the "dinky" engine?

A. Yes.

Q. Did you ever work under Ramsey, the plaintiff here?

A. Yes.

Q. How long did you work under him?

A. About three months.

Q. When you were on that train, did you haul any ore from the Martin mine?

A. Yes.

Q. When ore was brought in from the Martin mine which end of the train would you ride on?

A. Most of the time I rode on the back end.

Q. What was the reason for that?

A. Accidents; the cars coming uncoupled and liable to run back and hurt somebody down there at the shute where they were loading. Sometimes they would come uncoupled.

Q. Who instructed you as to the place you should ride on?

A. Mr. Gibbons for one, and Mr. Brazzel, and also Mr. Ramsey told me he thought it would be best.

Q. Did you ride part of the time up in front in the cab?

A. Sometimes I would; it just depended upon how many cars we had; how long the train was.

Q. When you would go out to make a shift of cars in with the engine, how would you go about it? Which end of the train
146 would you get on to ride in? Would anybody instruct you as to which end to get on at the time?

A. Not every time, no.

Q. Who directed how your work should be done on that train as brakeman?

A. Mr. Gibbons, Mr. Ramsey and Mr. Pipkin, the shed boss.

Q. When you would come in with a string of cars from the

Martin mine, what would be the method of switching those cars into the shed?

A. You mean where we ran them into the shed?

Q. As you came in, would you give any signal for the people to help you make the switch ?

A. Yes; blowed the whistle.

Q. Then what would yo do? Suppose they didn't get there right prompt?

A. If they were not there, we were supposed to wait for them to come.

Q. Then, what would be done until the cars were switched?

A. When they came we would make a flying switch there and run the cars into the shed.

Q. Who pulled the pin from the engine in making the flying switch?

A. I pulled the pin most of the time myself.

Q. How would you do?

A. I always went over the cars after we got to the county road up there/ went over the cars, and then pulled the pin down here to make the flying switch.

Q. Did Ramsey ever pull the pin while you were working there for him?

A. No, I don't think he did.

Q. Do you remember any occasion down there when Mr. Ramsey was running the engine when he attempted to make a flying or drop switch, and for some reason the switch would not be turned in time and the cars followed his engine in on the track he took?

147 A. Yes, I think we had that to happen about twice.

Q. While Ramsey was on the engine?

A. Yes.

Q. What would you do then?

A. Have to go and back up, push the cars back.

Q. You mean, make another try for the switch?

A. Yes.

Q. If the engine stopped a little piece from the switch and the cars bumped into it, was there any way that the engineer could operate the engine so that the jolt would not be so great, or how would that be handled? Would the cars just smash into the engine, or could the engine be operated so that the shock would be broken?

A Sometimes they bumped into the engine, and sometimes not.

Q. This car (referring to the model introduced in evidence) is loaded up with bauxite. That looks like and is just about iike the real?

A. Yes.

Q. Does it sift out of the car in running in little pieces?

A. Yes, it comes out the sides in fine particles.

Q. You mean it sifts through while the car is running?

A. Sometimes it does.

Q. This "dinky" engine I show you, where is the coal kept in that cab? (Referring to photograph marked D.)

A. On the left side.

Q. State if that sifts out?

A. No, unless you get the box too full and it slips out.

Q. In operating the engine, does the coal sometimes sift out of the box on to the track or road-bed?

A. I don't think they ever have so much in there that it ever sifts out to amount to anything.

Q. That switch operates by pulling a piece over like this close against the other piece. (Indicating.)

148 A. Yes.

Q. If open, the cars go on one track, and if closed comes in on that track. (Indicating.)

A. Yes.

Q. Suppose the switchman was there to turn the switch, and a lump of coal or some dirt got in between that flange and this (Indicating.) Could it be closed?

A. No; you could not pull it over.

Q. It would have to be stopped until that could be cleaned out?

A. Yes.

Q. State if you ever saw that to happen while Ramsey was operating the engine?

A. I don't know that it ever happened at that switch; it has, though, at switches.

Q. Switches that your train would run over?

A. Yes.

Q. And that Ramsey would be in charge of?

A. Yes.

Cross-examination by Mr. MEHAFFY:

Q. When you would come over the train, when you were brakeman, you would come over and go to the engine and lift the pin?

A. Yes, most of the time.

Q. And then these boys that came from the shed, one of them would throw the switch after he passed it?

A. No.

Q. Who did that?

A. I threw the switch.

Q. When you came over to the front end, you threw the switch yourself?

A. Yes; I would get off and throw the switch.

Q. Mr. Raper, I believe, was the brakeman after you?

149 A. Yes, I think so.

Q. He stayed on the back end? And when they would whistle for these boys, they would come and throw the switch. Do you know anything about that?

A. No. I don't know anything about that.

Q. How long since you worked there when the injury occurred?

A. I don't remember. It must have been somewhere about a month or maybe over. I don't know. Maybe two months. I could not say.

Q. What did you say about the switch having failed to work?

A. I said I didn't know that switch had ever failed. Switches we had run over do sometimes.

Q. But, so far as this switch is concerned, you never saw it to fail, that you remember of?
A. No.
Q. Where you did see it fail, what was done?
A. We had to back up and clean up.
Q. Well, the cars went on following the engine, of course?
A. Yes.
Q. How fast would those cars be going?
A. It just depended upon how fast they were running.
Q. That's exactly what I am asking you?
A. Sometimes they would be going slow, and sometimes fast.
Q. What would you call "fast," in making this switch?
A. I don't know what rate it would be.
Q. Five or six miles an hour?
A. I don't suppose it was going hardly that fast.
Q. A man could run faster than they were going?
A. Yes.
Q. So that if the switch had missed, he could run on ahead of the cars and notify the engineer. There would have been no difficulty about that?
A. No, I guess not.
150 Q. If the switch behaved or was open or thrown properly, the cars would take the other track, and there would be no no need to give him any warning?
A. No, not if the switch was thrown al- right.
Q. If it wasn't thrown al- right, the party who attempted it would still be ahead of the cars. That is to say, he would be attempting to throw the switch before the cars got there. If he found he could not do it, he could then beat the cars to the engineer?
A. I suppose so.
Q. At any rate, he could give him ample warning if he saw it so as to prevent his getting injured?
A. Yes.
Q. Mr. Gibbons and Mr. Ramsey had given you instructions, and Mr. Brazzel had also told you he thought it was better for you to stay on the back end of the train to protect persons back at the mines?
A. Yes.
Q. That the train might break in two and probably injure somebody back at the mines, and for that reason, to protect them, you had better ride back there?
A. Yes.
Q. You are still working for them?
A. Yes.
Q. These other switches, were they made like this flying switch?
A. No. They are not made exactly like that. They have not got the iron lever there.
Q. They haven't got this lever that operates the switch like this one?
A. No.

Q. In making the flying switch, would the drop be made like it was here after the switch was turned?

A. The other switches? No, they don't have to.

151 Q. This was the only place they had a switch lever that you could handle it with, and it was the only place where you made a flying switch?

A. Yes.

Direct examination:

Q. You say you found some other switches, but not this one, where the dirt had accumulated and prevented them from being thrown?

A. Yes.

Q. You said twice in making a flying switch there the switch would not turn in time and the cars followed the engine in on the track. Did you refer to that particular switch where Ramsey was injured?

A. No.

Q. To some other switch?

A. I don't remember whether that switch there or one below there. It seems to me like we had some trouble there once, I won't be sure, at that switch. I think it was a piece of wood got in there.

Q. That kept it from turning?

A. Yes.

Q. State if you ever cleaned out the dirt from in that particular switch where Ramsey was injured?

A. Yes.

Q. What did that dirt come from. From the cars?

A. Some of it would, I presume, and some of it from the coal there. We had a coal bin there, and it came from filling up the coal box.

Q. What coal box?

A. Right there close to the switch.

Q. Did you ever fill the coal box right up at that switch?

A. The coal box is just a little piece below the switch, but we would stop there and get coal and put it in the engine.

152 C. M. CULP, being duly sworn, testified for the defendant:

Q. Where do you work?

A. I am not working at all.

Q. What is your business?

A. Locomotive engineer.

Q. What is the last job you had?

A. On the Iron Mountain.

Q. Have you ever operated the "dinky" engine on the Aluminum Company's tram-way?

A. Yes.

Q. Are you familiar with its appearance and mode of operation?

A. Yes.

Q. I will ask you if in the last few days you made any measurements of the dimensions of that cab with the idea of using them as testimony in this law suit?

A. Yes, I made a few measurements.

Q. Have you got a memorandum of what those measurements are with you?

A. Yes.

Q. I will ask you, then, to tell me the measurements from the fire box to the outside of the plank upon which the man is standing in photograph D, showing the depth from here to there, from the fire box door to the end of the plank?

A. I think it was three feet.

Q. Have you got the memorandum?

A. Yes.

Q. Did you measure it?

A. Yes.

Q. Look at the memorandum and see if that is right. How wide is it across to there, that is, standing room, in depth?

A. That's three feet.

Q. Three feet square?

153 A. Yes.

Q. I will ask you if you sat in the engineer's seat in the cab and tried to reach as far as you could to the coupling?

A. Yes.

Q. Reaching as far as you could with your left hand, that is, by turning your body and holding on to something, how near could you come to the coupling? Could you reach it?

A. No. I think the best I could do was 12 inches.

Q. Within twelve inches of it?

A. Yes.

Q. What position were you in when you made that reach and got within twelve inches of the coupling?

A. I was in a swaying position as far as I could reach in any position with one hand holding on to the seat.

Q. You could not reach it, at any rate?

A. No.

Q. Suppose you would put your arm and head out of this window (referring to window on right side), how far would your left hand reach? If you kept your elbow in the window and your head out, how far would your hand be from the pin, reaching towards it?

A. I measured that it would be something over three feet.

Q. In uncoupling between the engine and those cars, can it be done with one hand, just lifting the pin ordinarily?

A. It depends upon circumstances; you can sometimes, and sometimes you can't.

Q. Suppose the cars are up against the engine?

A. Then you could not lift it.

Q. You mean with one hand?

A. No.

Q. How would it have to be lifted?

A. You might strain it out with one hand; by straining sometimes you could work it out. You could take and raise the

154 draw-bar and get slack enough to lift the pin, but you would have to use both hands. If the slack is out, you can lift the draw-bar.

Q. You can lift the draw-bar with one hand and lift it?

A. Yes.

Q. Suppose the engineer desires to uncouple the engine, where would he have to stand and in what position would he have to be to reach this draw-bar and get the pin out?

A. To be safe, you would have to get down upon one knee.

Q. Where?

A. On the platform or gangway. We might call it on that board.

Q. Suppose the man was not so particular about being safe, but just wanted to get the pin out?

A. There is a foot board on that; put one foot on that foot board and leave your other one up in the gangway, or step both feet down there.

Q. Step down in here and reach it? (Indicating.)

A. You could hardly pull that pin by standing here on that train without getting one foot down, or getting upon your knee, one or the other. (The witness illustrates by standing on a small platform.) This is 14 inches below here. Then you have got to go out a distance. You are liable to overbalance. Unless you get down on your knee, you can never do it.

Q. This piece of iron that you call the draw-bar is the piece that couples on to the first car from the engine?

A. Yes.

(Said draw-bar is introduced in evidence) is attached to bill of exceptions and marked exhibit "H" thereto.

Q. You have been an engineer a number of years?

A. Yes.

Q. Suppose a man undertakes to get around in the position you have described and lift the pin, can he see what is ahead, see down the track, what is ahead of his engine?

A. No.

155 Q. Could he retain hold of the throttle of his engine and retain control of that and lift that pin at the same time?

A. No.

Cross-examination by Mr. MEHAFFY:

Q. If he actually did lift the pin and make the drop with his engine, then if the switch was thrown it would not make any difference whether he made it with one hand or two, or whether it had been strained or not?

A. No.

Q. It makes no difference, so far as the engine taking one track and the cars the other track is concerned, how it was done or who did it or anything about it?

A. Yes, it makes a difference who did it.

Q. What difference?

A. I don't know that it would make a difference one way or another, but it would make a difference with the railroad company. They don't allow me to do another man's work. You understand,

hen these cars are together there is no danger attached; but when
ey are separated you create danger.
Q. The question I asked you was, if the pin is actually pulled,
makes no difference whether it was done with one hand or two,
whether you strained or not, and the engine takes its proper track,
en if the switch is set so that the cars take the other track, it
as nothing to do so far as any injury is concerned?
A. None in the world.
Q. Were you at work at the time of this injury?
A. No.
Q. It is said that the pin was pulled, and that the engine took
ne proper track, and then that the switch, after the engine passed,
as not thrown. You would not pretend to say that the pulling of
the pin by anybody had anything to do with it?
56 A. No; nothing to do with throwing the switch.
Q. You said something about 14 inches.
A. 14 inches from the top of this board to this draw-bar. (Refer-
ng to photograph D.)
Q. Did you make that measurement?
—. —— ——.
Q. That board is right level with the bottom of the engine.
A. Yes. The back of the engine where the engineer stands.
Q. How high is the door of the fire box above?
A. I don't know.
Q. See if you have got a memorandum of it?
A. I didn't measure it. But I think two or three inches or
nore.
Q. Can you tell from this diagram? (Handing witness.)
A. No, only by guesswork.
Q. This board is level with the back of the engine?
A. Yes.
Q. I am asking you how far above that where the man stands is
he fire box? You say you think two or three inches?
A. Yes.
Q. That would be, of course, the bottom of the door?
A. Yes.
Q. In other words, the bottom of the door of the fire box is
bout two or three inches above the place where Ramsey stood?
A. Yes.
Q. Then, if you got down on the ground the fire box would be
omewhere between two and three feet above where he was stand-
ng?
A. I don't know. We never measured that. I would judge it
ould be, though, up in that neighborhood.
Q. You did not take any measurements of that?
A. No.

Redirect examination:

Q. You said it would make no difference if the man was
57 operating the pin in the way you have described so far as the
switch's being thrown was concerned. I will ask you if the

position he would have to be in to pull the pin would interfere with his seeing what was ahead of his engine?

A. At the time he was pulling the pin?

Q. Yes. If the man was pulling the pin on this engine in the way which you have described, if he could see where his engine was going?

A. No.

Q. When you were running this engine, did you ever find it necessary to get on the ground to attend to your fire in the engine?

A. No.

Q. How would you handle it?

A. I stayed up in the engine. I could get down on the ground and fire the engine if I wanted to, but that wasn't necessary.

Q. Can it be fired from the cab just as well as from the ground?

A. Yes. Some people would consider it could be fired one way better than the other way. I would consider it could be fired better from the cab of the engine than on the ground.

Q. In running the engine on the road, of course there would be no way to get on the ground and fire it?

A. No.

Q. I will ask you if you made an experiment with the clinker hook? What is this? (Indicating.)

A. That is the ash hole.

Q. That has nothing to do with making the fire?

A. That's for cleaning the ashes out of the ash pan.

Q. That's done underneath the engine?

A. Yes.

Q. The clinker hook, have you got a memorandum showing the length of that?

A. I believe we measured the clinker book. Yes. Five feet.

158 Q. What is the depth of the fire box from the door to the back wall?

A. You mean the length? 33 inches.

Q. I will ask you if you experimented with that clinker hook to see if the fire could be attended to with it from the cab as well as on the ground?

A. Yes.

Q. What did you find as to that?

A. I found that we could do better service in the cab.

Q. For what reason?

A. For the reason we could not get under the door well without straining ourselves.

Q. Take these two pictures and explain that.

A. It is necessary to have coal under this door just as well as it is under the flues or in the back end of the fire box, as well as in the front. You are standing on the ground; the fire box is here. You put your coal back here against this just as well as up here against the flues. In getting this coal up against this back here you bring your clinker hook in the fire box and rake it back here; the lower down you are under that the higher you have to raise

your hands and get this coal in here. In other words, the higher up this clinker hook stands in the door the easier it is to bring this coal back under the fire box door.

Q. I will ask you if standing in the cab you have to catch the clinker hook any shorter to rake the fire than you have to when on the ground?

A. No.

Q. It would be as hot to use it from the ground as in the cab?

A. Almost.

Recross-examination by Mr. ARMISTEAD:

Q. You have devoted your testimony here solely to the
159 position that the engineer or fireman should assume when he was putting coal in the fire?

A. No; spreading it out with a clinker hook.

Q. Is the clinker hook used for any other purpose?

A. For cleaning it.

Q. How is it used for cleaning it? How is the process?

A. Made in a hook form for taking out the clinkers.

Q. How does he get these clinkers out?

A. Takes them out the door.

Q. Takes them right out over this board?

A. Yes.

Q. Then, what does he do with them?

A. Throws them over the dump.

Q. Over what dump?

A. Any dump he is standing on, or on the track, or anywhere he can on the road bed.

Q. That is, he rakes them back over this board he is standing on. If the engineer was standing on this board, and used the clinker hook, he would rake the clinkers right back over his feet or between his legs?

A. If he stood upon the back he would.

Q. The board is between his legs?

A. Yes.

Q. Would he take the clinker hook and rake them back under his legs or sideways?

A. I don't know how he would. I would not.

Q. You would not?

A. I would get on the ground and clean the fire box. I would not rake them over my shoes. You will burn your shoe soles off.

Redirect examination.

Q. What do you mean by getting on the ground and cleaning the fire?

160 A. If that fire has to be cleaned, you have to get on the ground and shovel your clinkers away at the back of the engine.

Q. You mean, you would bring the clinkers out from the f-oor?

A. Yes; the only place in that engine you can bring them out.

Q. Get them out on there and scrape them off?
A. Shovel them over after we rake them down under the door on the back.
Q. He would rake them out from the fire box?
A. Yes.
Q. And then take the shovel and push them out?
A. Yes.
Q. Is it necessary for you to stand in the middle of the track and push them out on the ground?
A. On the side generally with the rail between your feet.
Q. You push them out, then, from the cab off to one side?
A. Yes.
Q. That is after you get them out from the fire box?
A. Yes.

161 *Testimony of A. H. Lane.*

A. H. LANE, being duly sworn, testified for the defendant:

Q. Are you connected with the Aluminum Company?
A. No.
Q. Were you employed by them some time ago?
A. Yes.
Q. What position?
A. First one thing and another.
Q. Did you run the "dinky" engine for a time?
A. Yes.
Q. What time of year did you run it?
A. I ran it in the Spring, the Summer and Fall.
Q. Did you run it before and after Ramsey was hurt?
A. Yes.
Q. I show you a photographic view of the "dinkey" engine, marked D. In firing that engine, or attending to the fire, where would you stand to do that work?
A. Where I am standing there now.
Q. Is that your picture?
A. Yes.
Q. Is this your picture also? (Referring to photograph C.)
A. Yes.
Q. Did you ever find it necessary to stand on the ground to attend to the fire in that engine?
A. No.
Q. Were you at Bauxite the day Ramsey was hurt?
A. Yes.
Q. Did you go to the scene of the accident?
A. Yes. I was there in a few minutes after it occurred.
Q. Did you see anything about the brakes that were set on the cars then?
A. No; I never paid any attention to the brakes.

Q. Did you hear Ramsey make any statement as to who
162 was to blame for the accident? If so, state what he said?
A. When I walked out there, there was quite a crowd

there; three or four. Brazzell came after me. I went up there and Brazzel told me to come up and take charge of the engine. I went up there. Houston was laying on the ground right on the road crossing. All I heard him say was, "I pulled the pin myself." He said, "Lane, I blame nobody but myself". All the boys were jumping around there kinder scared about the accident. Mr. Brazzel said, "take the engine", and I got up on the engine and took the engine.

Q. You heard him make the statement that he pulled the pin and blamed nobody but himself.

A. Yes.

Cross-examination by Mr. MEHAFFY:

Q. That's all you heard him say?

A. Yes.

Q. You say the boys were jumping around there scared?

A. Some of them. It is natural for a man to be scared to see what occurred.

Q. That's how came him to say that?

A. Who?

Q. Ramsey.

A. I don't know that that caused him to say that. I never asked his reason for saying that.

Q. I thought the connection in which you said it was how you intended to convey the idea why he said it?

A. No. He said, "I pulled the pin." I heard him say that. "I pulled the pin." He said, "I blame nobody but myself."

Q. That's all you heard him say?

A. Yes.

Q. How long were you there?

A. Five or six minutes, I suppose. I never timed myself.

Q. When you were there, he just said, "I pulled the pin, I
163 blame nobody but myself." That's all he said?

A. That's all I heard him say.

Q. When were these photographs taken?

A. I don't know just exactly what day.

Q. Shortly after the accident?

A. No; quite a while.

Q. Were you still at work there?

A. Yes.

Q. So, at the time these photographs were taken and you took your position there, you were at that time an employé of the company?

A. Yes.

Q. You were helping them get up this evidence?

A. No.

Q. You were helping to that extent, giving the positions there for the photographs.

A. He asked me how I stood to fire it, and I showed them how I stood.

Q. You were doing that for the purpose of these photographs?
A. I suppose I was.
Q. You know you were.
A. Why, certainly I know I was.
Q. And you can't tell how long that was after the accident?
A. No, I don't know just how long afterwards.
Q. You can't say whether it was a few days or months?
A. I could not say just exactly how long it was.
Q. You did not take any position that you would have taken to remove the clinkers?
A. Yes; just the way I fired it.
Q. I am not talking about firing.
Q. You asked me about the clinkers? That's what I wanted to tell you.

Q. You would take the same position?
164 A. Take the same position with the shovel to clean the clinkers as I would to attend the fire.
Q. How would you use the clinker hook in getting the clinkers out?
A. I never used the clinker hook. I had it on there half a day and laid it off.
Q. You never used that at all?
A. No.
Q. You used a shovel in getting the clinkers out?
A. Yes.
Q. How did you get them out when there was a fire in there?
A. Why, easy. I would not throw out my fire to throw out a few clinkers.
Q. You could not very well get the clinkers out and keep up the fire?
A. Put on my blower, run the shovel in and get the clinkers out and throw them out the cab.
Q. If you had to keep the fire up, keep up the steam and keep the engine at work, you would use the clinker hook?
A. No.
Q. You would not use the clinker hook at all?
A. No.
Q. You would just stand up there with a shovel and take the clinkers out with that.
A. Yes.
Q. The clinker hook, then, serves no purpose at all?
A. Not with me.
Q. When you said Ramsey made the statement that you have mentioned or stated that he did, do you know who else heard it?
A. I don't know how many heard it.
Q. Who was present?
A. There was Mr. Pipkin. I suppose Mr. Brazzel. There were quite a few around there.
165 Q. Who were the "quite a few." You have named Pipkin and Brazzel?

A. There was Bob Page around there somewheres. I don't know who all exactly were there.
Q. Do you know anybody else?
A. As I told you, Pipkin was there.
Q. You said Pipkin, Brazzel and Page. Do you know of anybody else?
A. No, I don't know *what* all was out there.
Q. You can't tell anybody else's name that was there?
A. No, I don't know that I can.
Q. Brazzel is the general boss there?
A. Yes.
Q. Pipkin is the shed boss?
A. Yes.
Q. Page is the fellow who testified here yesterday.
A. Yes, I suppose he is.
Q. Don't you know there was quite a number of other persons there?
A. There might have been there forty to fifty, but, as I told you, I never noticed.
Q. Those are the only ones you noticed.
A. Yes. There might have been forty — fifty; I could not tell.
Q. Do you know whether there was any body heard the statement that you said Ramsey made besides you?
A. I don't know.
Q. You don't know whether anybody heard that but you yourself?
A. No; I never paid any attention.
Q. Was it said to you? Was he talking to you?
A. I don't know particularly whether he was talking to me or not.
Q. Do you know particularly whether he was talking to any person especially?
166 A. No, not for sure.
Q. He didn't say anything but the words you mentioned during the time you stayed there?
A. I didn't stay there very long.
Q. Five or six minutes?
A. Yes.
Q. It didn't take half of a minute to say that?
A. I don't suppose it did. The engine was right there. I went on and took charge of the engine.
Q. I am not talking about after you took charge of the engine, but the five or six minutes you were there?
A. The engine was standing right there.
Q. I have not asked about that.
A. And I went to the engine.
Q. I am not talking about that. I am talking about the five or six minutes that you were there?
A. That's where I was at.
Q. I understand. For five or six minutes?
A. Yes.

Q. And those words that you have mentioned are the only wor
that he spoke while you were there?

A. He might have said a hundred, but I never paid any atte
tion. I just asked him, "How did this occur?" and he said, "I pull
the pin myself. I blame nobody but myself."

Q. If that is true, what did you say a minute ago that he was
talking to you for?

A. I suppose to the whole crowd there.

Q. But you say now that you asked him how it occurred?

A. That's all I know about that.

Q. So, then, he was talking directly to you?

A. I suppose he was.

Q. You testified a while ago that he was not?

167 A. He could have been talking to all of us, for all I kno
I was just standing there. Brazzel said, "Come up and ta
charge of that engine."

Q. You went up there and asked him a direct question yoursel
That's the way you put it now. And he answered you, and th
you stayed there for five or six minutes from the time you got the
and he never said anything more?

A. I suppose he was laying as close to the engine as to the corn
(indicating). That's where I was standing.

Q. You say you were there at Ramsey where you could hear hi
where those words were said for five or six minutes? Did he spe
to anybody else while you were there?

A. I suppose he was talking to all of us.

Q. Then, if he was, what did you say a while ago those were
the words that he said?

A. I said that's all he said to me.

Q. You didn't say that. You said at that time that he didn
say that to you particularly?

A. I spoke to him.

Q. At first you said he didn't. At first you said he didn't spe
to anybody in particular, and these were all the words that he sa
while you were there?

A. That's all I heard him say. That's all I asked him.

Q. And that's all he said. Did he speak any other words b
those you have mentioned?

A. That's all he spoke to me.

Q. Did he say that in the presence or hearing of any others?

A. I was right down over him. I don't know who was all rig
down over the man.

Q. Did he speak any other words that you heard there at al

A. I didn't hear any. He might have said more, but I nev
paid any attention to what he said.

168 Q. Why didn't you pay attention to the other things
said?

A. I went on. I was standing there five or six minutes with t
engine.

Q. Weren't you as close to him then as at any time?

A. No.

Q. You was there five or six minutes where you could hear what he said?

A. Yes. I suppose he was talking to them. I never paid any attention to what he was saying.

Q. You say you "suppose he was talking to them."

A. I reckon he was.

Q. If that is your idea now, why didn't you say that when I asked you if that was all he said?

A. I was trying to answer the best I could, all I know about it.

Q. How long has it been since you quit working for them?

A. I quit there along in January.

Q. Last January?

A. Yes.

Q. When they shut down?

A. Yes.

Q. You say you ran the engine?

A. Yes.

Cross-examination continued by Mr. ARMISTEAD:

Q. Did you run the engine before Mr. Ramsey was hurt?

A. Yes.

Q. How long before he was hurt?

A. I don't know just exactly how long.

Q. Can you state about how long?

A. No; I don't know how long.

Q. Do you know whether ten years or one week?

A. I guess it was more than one week, and it wasn't ten
169 years. The company hasn't been there ten years.

Q. Was it more than two weeks?

A. I don't know just exactly how long; I was upon it regularly a little over a week; six or seven days, something like that.

Q. How long before he was hurt?

A. That was before he was hurt.

Q. How long before?

A. Quite a while before he was hurt.

Q. Were you upon it any before that?

A. Before he was hurt?

Q. Before this one week you speak of?

A. No. The first I took it on Saturday, about one o'clock and then ran it regularly that Saturday evening and the following week, cleaned it out on Sunday, washed it out, and I believe he took it on Tuesday.

Q. That's all you had run of it before he was hurt?

A. No. I ran it after that an hour or two at a time, or half an hour. He came down to Benton and I ran it until he got back. I don't know how long I ran it.

Q. Are you an engineer by profession?

A. No, not exactly. I fired over the road quite a while.

Q. Where have you fired?

A. For the Iron Mountain.

Q. On freight trains?

A. Freight trains, passengers and pay-car; first one thing and another; whatever I was called out on.

Q. Whenever you cleaned this engine out or removed the clinkers so as to get up a hot fire, you used a shovel?

A. Yes.

Q. That shovel had a wooden handle?

A. Yes.

Q. How long was the handle?

170 A. If I had a shovel up here I could measure. I never had any idea at all to measure the shovel handle.

Q. You can answer my question better than that. About how long was that shovel handle?

A. I suppose maybe two feet; I don't know how long.

Q. A wooden handle, about two feet long.

A. I don't know how long the shovel handle was.

Q. Can't you state about how long?

A. No; I never measured one.

Q. You say you never measured this, and you can't tell whether one foot long or five feet?

A. Yes.

Q. Would you say two feet? Do you mean that is your estimate?

A. I could not swear to you it was two feet long, because I don't know. I never measured one.

Q. Was it about two feet?

A. I don't know whether about that or not.

Q. Was it about three feet?

A. I don't know. I have had long-handled shovels.

Q. You say you don't know whether it was about two feet long. Do you know whether about three feet long?

A. No, I don't know whether about three feet or six feet long. I know it was a common shovel, that I have handled.

Q. Do you know whether about six feet long?

A. I told you I don't know just exactly.

Q. Do you know whether seven feet long?

A. No.

Q. Whether about eight feet?

A. Yes; I have more sense to know whether a common shovel is seven feet long, unless it is one to dig holes. That is the same shovel. (Referring to photographs.)

Q. This is the same shovel?

171 A. Yes.

Q. A wooden handle shovel?

A. Yes.

Q. What is this thing hooked on the engine? (Indicating.)

A. This rod hooked up there? (Indicating.) It looks to me like a hoe.

Q. What did you use it for?

A. For pulling cinders where they went through the grate.

Q. Where did you stand when you used it?

A. Upon my knees.

Q. Whereabouts?

A. Behind in under the engine.
Q. You stood behind the engine?
A. I will show to the jury. In cleaning these cinders out which come through this grate, I got down under here (indicating) and shoveled them under there. (Witness takes from his pocket a photographic view of his own, and continues his explanation to the jury from that.) I went back under here (indicating) and shoveled them cinders out from under the ash-pan in under there. Me and the brakeman had that picture taken a good while before he was hurt there. We got down on our knees and shoveled them under. It is low on the ground. You could not stand on the ground and run that under there. You would break your back.
Q. When you used this thing you call a hoe, did you stand on the track back of the engine?
A. Got in under the engine sometimes; sometimes I was down there on the ground.
Q. Did you go in from the rear of the engine?
A. Went under the front end of the engine in the morning.
Q. What of a night?
A. I slept.
Q. Did you ever take that hoe and stand back of the engine and use it?
172 A. No. I had to get down there, I told you, and shovel those cinders under there.
Q. No you have not.
A. I pulled them out from under the engine.
Q. I will put it so you will have to answer it. Did you ever stand behind the engine and use that hoe?
A. Yes; shoveled them under the fire box. That's under the engine; that's not in the engine, but under the engine.
Q. You used this short-handled, wooden-handle shovel, to put coal in the fire?
A. In the fire box?
Q. And to take the cinders out?
A. Yes.
Q. It didn't bother you?
A. No.
Q. You could reach in there anywhere?
A. Yes.
Q. A hot fire or not?
A. A hot fire or not.
Q. You rammed that down in there and picked out the clinkers or cinders?
A. Never had very many clinkers; I would throw them out and throw in new coal.
Q. To whom did you first make this statement that you have made here as to what Ramsey said to you about his injury?
A. I was telling my wife about it.
Q. Who else did you tell it to besides your wife?
A. I don't know who all.

Q. When did you first think of it? When was it first called to your attention to remember it? About his saying it was his fault?

A. I thought about that when he told me.

Q. And then you told your wife. Who else did you tell?

173 A. I don't know. I was all over the country since then. I don't know who I have been talking to.

Redirect examination:

Q. Counsel don't seem to understand very much about this engine. When you were cleaning the ashes from under that engine, where would you get?

A. Under here and take them out under the engine in the morning. Very often, when using that hoe, coal gets in under it; then you jack them out of the little hole made for that purpose.

Q. Is that solid across there? (Indicating.)

A. Yes. Right in here is about the level of the fire box; right about there are the joists and here is the end of the fire box. (Indicating). You get down in there (indicating) and pull them back or jack them forward. I have no use for the hole in firing up or cleaning the fire in the fire box.

Q. You would not pull them back with this thing from the fire box?

A. No.

Q. Could you get your rod underneath there? (Indicating).

A. You could by stepping down here (indicating) and shoveling them in the ash-pan.

Q. Explain what you mean by having to step down?

A. When you have to get upon your knees on the ground. They generally did that in the morning or evening.

Q. If you were taking it out behind the engine, what position would your body be in with reference to the back of the engine, in order for you to get this hook under there?

A. Have to get clear down upon your knees.

Q. You could not stand up and do it?

A. No; you would have to get upon your knees.

Q. At night, when you take your engine in after the day's work what would you do to the fire?

174 A. Take my hoe and throw the fire all out.

Q. Would you clean the grates out?

A. Clean it so it would be ready for firing the next morning.

Q. Did you take the clinkers out as well as the ashes at that time?

A. Yes.

Q. Did you take those clinkers out through the fire box door?

A. Yes. There weren't many clinkers in it. Just a kind of little charcoal from slack coal.

Q. What kind of floor is this in the cab, a wooden floor or metal floor, where the engineer stands?

A. Where I am standing? That is wood, about two-foot piece, and about 12 inches wide. Down at the fire door there is a little piece of iron about 2 inches thick.

Q. Is that wood up to within a few inches of the fire door?
A. Yes.
Q. If somebody were to rake hot cinders out of that fire door on to that floor, what would be the effect on the floor?
A. It would burn the floor.
Q. When you quit running the engine after the accident to Ramsey—you did run it after he ran it?
A. Yes.
Q. Was the floor burned by any cinders or show that any cinders had been thrown out the fire door upon the floor?
A. After Ramsey was injured. No. I never noticed any place burned on the back there. I don't think there was.
Q. Is that plank natural colored or is it painted?
A. No, it is not painted.
Q. When you went up to Ramsey after he was hurt, I will ask you if you addressed some remarks to him as soon as you got there?
A. Yes, I spoke to him. I said, "How did this occur"?

(Objected to, as plaintiff is not bound by anything the witness said to him.)

175 Q. When you went up to him did you speak to him, and what did he reply?
A. I said to him, "Good morning". He said, "Good morning". I said, "how did this occur"—something that way. He said, "Why, I pulled the pin myself". He said, "I don't blame anybody but myself". I stood there a few minutes and wiped the sweat off of him. I never paid no attention. They were all talking there. I went to the engine. Brazzle told me to take charge of the engine. I went to the engine. The engine was right there by him.
Q. When he made that remark, it was in answer to what you had addressed to him?
A. Yes.
Q. If he said anything to you after that, it wasn't in reply to any of your questions?
A. They were all talking. I went up to the engine.
Q. At the time you got there had anybody gone for a cot or gone to get anything to help him with?
A. I think Bob Page went on off after a cot with some of them. I don't know who all went after it; I paid no attention.
Q. That was about nine o'clock in the morning?
A. Yes, I suppose it was.
Q. Was it a bright day?
A. I don't know. I think it was, as well as I remember.

Recross-examination by Mr. MEHAFFY:

Q. He said one other word. He said "Good morning"?
A. Yes.
Q. Didn't he say something else?
A. I don't know all he said. I just spoke to him.
Q. I mean that you heard?
A. He was jollying there something with his leg.

Q. I mean something else that you heard. That was all?
176 A. That was about all.
Q. He said, "Good morning. I pulled the pin myself. I blame nobody else"?
A. No. I don't know what all he must have talked about. They were all asking him how it occurred. I reckon probably twenty-five asked him how it happened.
Q. One right after another?
A. I don't know.
Q. Did he answer each one of them the same way?
A. I could not tell you whether he did or not.
Q. Did you hear twenty-five men ask him?
A. I didn't pay much attention to it.
Q. Did you hear anybody else ask him how it happened?
A. Yes, I believe Pipkin asked him?
Q. Before or after you asked him?
A. Well, about the same time.
Q. You asked him the same time?
A. Somewhere in the neighborhood.
Q. Both of you said, "Good morning" at the same time?
A. I reckon we did. We were both up there together.
Q. You both said "Good morning" and Ramsey said, "good morning" and you both asked him how it happened, and he said, "I pulled the pin myself, I don't blame anybody"?
A. He said, "I pulled the pin myself".
Q. "I don't blame anybody"?
A. He said he blamed nobody but himself. That's all was said there; by that time Brazzle told me to take charge of the engine.
Q. And you took charge of it?
A. I took charge of the engine.
Q. As soon as you got off the engine, you went home and told your wife?
A. I suppose I did. It is just natural for a man to tell his
177 wife anything. I told her more than that. I told her about men getting hurt on the road at other places, too.

Testimony of A. H. Pipkin.

178 A. H. PIPKIN, being duly sworn, testified for the defendant:

Q. Where do you live?
A. Bauxite.
Q. Where do you work?
A. At Bauxite.
Q. For the Aluminum Company?
A. Yes.
Q. What was your position last June with the Company?
A. Foreman of the mill.
Q. When a run would be made from the Martin mine, what would the train do when it came near to the mill? Give any signal or anything?

A. With a lode of ore? Yes.
Q. What would they do?
A. They would whistle when coming in on the curve.
Q. And some men that rode the cars to the mill would be sent out?
A. Yes. I had two brakemen that handled the train in the mill. They would go out and meet the train.
Q. You supervise- how that switching was to be done, how the cars were to be uncoupled and switched on to the shed track, or anything of that kind?
A. No, that was out of my line of duty. I was foreman of the mill and had nothing to do with that.
Q. Did you have anything to do with the outside of the mill at all?
A. No.
Q. Who had charge of the track and how that switching was to be done there, how the cars were to be uncoupled and how the switch was to be thrown?
A. I suppose the engineer.

Mr. MEHAFFY: Don't suppose, but tell how it is.

179 Q. You say you don't know whether it was the engineer or not?
A. Sure. He had charge of it.
Q. After the injury to Ramsey, did you go up there before they moved him?
A. Yes.
Q. Did you hear him say anything in regard to how the accident happened? If so, state what it was?
A. I asked him when I got to him, "Houston, who on earth pulled the pin". He said, "I pulled it myself".
Q. Did he say anything else?
A. No, not to me. He spoke to Hunter, when Hunter came running up; Hunter Lane.
Q. What did he say to Hunter Lane about it? Did you hear it?
A. I was right present. Hunter ran up. I ask some of the boys for a handkerchief. Sweat was all over his face; he was lying in the hot sun. Hunter Lane jerked one out and gave it to me. He said "What on earth happened? What's the matter here? What caused this?" Houston said, "I don't know. I don't blame anyone but myself. I pulled the pin" he said "I can't blame anyone but myself." That's the way he spoke. "I pulled the pin myself." I think that was as near as I can give it.

Cross-examination by Mr. MEHAFFY:

Q. That was all you heard?
A. Yes.
Q. Is that all he said while you were there?
A. Yes.
Q. So you spoke to him first?
A. After I got to him.

Q. Just asked him who pulled the pin?
A. Yes; that — the question I asked him.
Q. What made you ask him that? What made you ask him wh
pulled the pin?
180 A. I could not see why anyone else should pull the p
and not throw the switch behind him.
Q. What was your object in finding out who pulled the pin? W
it the business of the party who pulled the pin to throw the switch
A. Sure.
Q. That's what you were trying to find out?
A. Yes.
Q. Then, it was not Ramsey's business to throw the switch?
A. To pull the pin or throw the switch? No.
Q. It wasn't his business to throw the switch?
A. No.
Q. Now, then, if the pin was pulled, and the person who shou
have pulled the pin was there, he could still have thrown the swit
just as well?
A. How is that?
Q. Even if Ramsey pulled the pin when another man was the
to do it and would have done it, this other man who was there cou
still have thrown the switch just as well?
A. Yes.
Q. It would have made no difference who pulled the pin if th
switch had been thrown?
A. Sure.

Mr. LOUGHBOROUGH: What has that to do with it. He is askin
for deduction of this witness, who did not see it.
Mr. MEHAFFY: You don't like it?
Mr. LOUGHBOROUGH: It is not right. It is not proper testimony

Q. It wasn't Ramsey's business at any time to throw the switch
A. It don't look like it would be.
Q. Just answer the question?

(Objected to.)

Mr. MEHAFFY: I am asking one of the bosses if it was his dut
Mr. LOUGHBOROUGH: The boss of the mill had nothing t
181 do with it.

Q. Did you send these boys out that morning?
A. Sure.
Q. You sent them out there to the switch?
A. I sent them out there to bring in the train.
Q. You sent them out to the switch?
A. No, to bring in the train.
Q. I know, but didn't you send them to the switch to bring it in
A. No.
Q. Weren't they to bring it from the switch?
A. No; they met it above the switch.
Q. Weren't they to ride the cars in from the switch?
A. Sure.

Q. Then you sent them out there for that purpose?
A. Yes.
Q. Did you give them any specific instructions as to what they should do?
A. They knew their business.
Q. Did you give them any instructions? Did you give them any directions about what they should do?
A. No.
Q. None at all?
A. No.
Q. You just sent them out there?
A. Yes.
Q. They knew what they were to do?
A. Sure.
Q. What is your business now?
A. I am night watchman.
Q. For the Bauxite people?
A. Yes.
Q. How were they to know what they were to do when they 181½ got out there, if you did not instruct them?
A. How was I to know what they were to do? I don't know whether I could explain that.
Q. You said they knew what they would do out there. That they knew their business. I want to know how you know they knew it?
A. They had been making trips all the time.
Q. You don't know what they had been in the habit of doing? Can you tell the jury how you got the idea that they knew their business if you gave them no instructions. You can't tell?
A. How did they know their business there?
Q. How did you know they knew it, if you didn't give them any instructions. You say they knew their business. Knew what to do out there?
A. Yes.
Q. And that you had not instructed them, and that you never was out there to know what they did?
A. I said I sent them out there to bring in the train.
Q. I ask you if you gave them any instructions as to what to do, and you said "no" that they knew what it was. You didn't tell them anything, but that they knew. Here is the question; If you never told them what they were to do out there, didn't give them any instructions, how do you know that they knew what to do, if you had never told them?
A. I sent them out to bring in the train.
Q. But you didn't tell them that. You said you never gave them any instructions at all, but they knew what they were to do. If you never did, what I want to know is, if you never gave them any instructions, how you know they knew what they were to do?

Mr. LOUGHBOROUGH: I am satisfied the witness does not understand.

Q. Don't you understand that question?

A. It looks like if I did I could answer it.

182 Q. You mean to say you don't understand it?

A. No, I don't understand it.

Q. You state that you never gave these parties any instructions as to what they were to do, but that they knew what to do. If you had not given them any instructions how do you know that they knew what to do? Don't you understand that question?

A. Yes.

Q. Then answer it? You can't answer it?

A. No.

Q. Then isn't it true that you don't know whether they knew their duty or not? That's plain? You understand that question?

A. That they did know their duty?

Q. Isn't it true that you don't know whether they knew their duty or not? You don't know whether they knew their duty or not. Can't you answer the question?

A. How is that?

Q. You don't know whether they knew thei- duty out there or not?

A. Sure I knew their duty.

Q. You knew their duty, but do you know whether they knew their duty?

A. Why, sure.

Q. That comes right back to the other question. If you know that they knew their duty, how do you know it?

A. Because they had been going to it.

Q. But you had not seen what they had done out there?

A. I never was out there when they did it.

Q. That's what you said a while ago?

A. Sure I have been out there.

Q. But you never told them at any time what to do?

A. No, only to bring in the train.

Q. Now, then, it was somebody's duty, some employé of this company's duty, to throw that switch. Some employé besides Ramsey?

183 A. Yes.

Q. So that the failure to throw that switch was the neglect of some employé of the company other than Ramsey? (Form of question objected to.)

COURT: You can ask about whose duty it was.

Mr. MEHAFFY: He said it wasn't Ramsey's duty. I wanted to see if it was the duty of some employé of the company other than Ramsey?

COURT: That question is a-l right.

Q. Was it the duty of some other employé of the company than Ramsey to throw that switch?

A. Sure.

Q. Then, that employé, if the switch was not thrown, had neglected that duty, and if the neglect of that duty was the cause of the cars following the engine?

Mr. LOUGHBOROUGH: That is improper. The switch might not have been thrown, and the employés not neglected their duty.

Q. Those cars actually did follow that engine down on the same track on into Ramsey?

A. Yes.

Q. If the switch had been thrown, they would have taken the other track?

A. Yes, if it had not split the switch.

Q. If it had split the switch, it would not have taken either?

A. No.

Redirect examination:

Q. You sent the men out to bring in the train, you stated?

A. Yes.

Q. Now, you did not supervise or attempt to instruct them how they should bring that train in in particular?

A. No.

184 Q. What employé of the company was it that controlled the movements of the train, where the train was to be stopped and when the flying switch was to be made, and instructed them when to turn the switch, and who was to turn the switch? Who had charge of that?

A. Mr. Ramsey.

Q. You mean the person in charge of the engine?

A. Yes; he was running it.

Q. Did he also act as conductor of the train?

A. Yes; he had it in his charge.

Q. Did you have any control over Ramsey?

A. No.

Q. No authority to direct him?

A. I kept his time; that is all I had to do.

Q. The day of the accident, after Page and McLaughlin started for the train, did you notice them going to the train?

A. Yes.

Q. I mean the switch that was made in which Ramsey was injured. Did you see them start up to meet the train that time?

A. Yes.

Q. I will ask you how they were going? Were they running or were they walking?

A. They were running.

Q. Had the engine whistled?

A. Yes.

Q. Could you see the coal house by the switch? Did you see them run as far as the coal house, or could you see that far from where you were?

A. Sure, I could have seen that far.

Q. Did you see them that far?

A. Yes.

Q. What was the last you saw of them before the train came down?

A. They were just about half-way, I guess.
185 Q. Were they running?
A. Yes.

Recross-examination by Mr. MEHAFFY:

Q. You say you did not have any control over Ramsey. Who did have?
A. He was his own boss.
Q. He didn't have Mr. Gibbon's place? He didn't run the whole thing?
A. He didn't run that part of it.
Q. Didn't somebody hire him to run that part of it? Or did he just come and take charge of it?
A. Sure; he had a job.
Q. Who gave it to him? You say you didn't have anything to do with him? Who did?
A. I don't know who gave him the job.
Q. Who gave you yours?
A. Mr. Gibbons.
Q. You don't know whether he gave Mr. Ramsey his or not?
A. No. I was not present.
Q. You simply know you didn't have any control over him?
A. Yes.

186 *Testimony of S. S. McLaughlin.*

The testimony of S. S. MCLAUGHLIN, set out in defendant's motion for a continuance at the trial, and which was conceded by plaintiff at the trial, was here read to the jury, and is as follows:

Taken by J. F. Loughborough and S. A. Copp July 12th, 1907.

Q. What is your name and initials?
A. S. S. McGloflin.
Q. How long have you been working for the company?
A. This time I have been working for them about a month.
Q. You have worked for them before?
A. Yes sir.
Q. What had you been doing there?
A. Working in the machine shop.
Q. Had you been working in the mines where the cars of bauxite were handled?
A. No sir.
Q. How long have you been working where this accident happened at the time it happened?
A. I had been working there about a week.
Q. What had you been doing there?
A. I had been switching cars where I was this afternoon when you saw me.
Q. What do you mean by switching cars?
A. Changing them off one track on to another.

Q. Would you be pushing them?
A. Yes sir.
Q. Just explain how a string of cars would be handled from the mines into the shed with the engine?
A. In handling cars from the Martin mine, from which mine we were handling cars at the time of the accident, the engine comes in ahead of the train, engineer blows the whistle at the curve below the mill in order that we men from the mill may come out
187 and assist him in making the switch; one man is supposed to get on the engine, the other about the middle of the train. The engineer then opens his throttle, giving the train of cars a start, then slackens enough to allow the man on the engine with him to pull the coupling pin. When the pin is pulled the engineer opens his throttle again and runs his engine in on what is known as the right hand track. As the engine passed the switch the man who pulled the pin is supposed to step off and throw the switch so as to cause the cars to run into the mill. As the cars pass the switch he is also supposed to get on them and assist the regular brakeman and the other man from the mill in setting brakes in order to keep them from running into the cars already under the shed.
Q. How far would you estimate that switch to be from the shed?
A. About 75, 80 or 100 yards.
Q. Do you remember the day of the month this accident happened to Ramsey?
A. Yes sir. It was the 18th of June.
Q. About what time of the day?
A. About 9:00 o'clock.
Q. What time did you go to work that morning?
A. 6:00 o'clock.
Q. What time did Ramsey go to work?
A. 6:00 o'clock.
Q. What was he doing?
A. He was both engineer and fireman of the Dummy.
Q. Does this engine have a tender?
A. No sir.
Q. Is it coupled on direct with the cars?
A. Yes sir.
Q. At the time of the accident, just describe in your own words how it happened?
A. He called, or rather blew his whistle for us. Mr. Pip-
188 kin, the mill foreman, says he is calling you boys. We started on a run and got beyond the switch about the time he pulled the pin and ran in on the siding, and as he ran in there I got on the cars and never noticed the switch. He got out of his engine to fire, and while he was firing the cars ran in behind him and crushed his leg.
Q. Which side of the track was you on at the time he passed you?
A. On the opposite side from the switch.
Q. How far from the switch were you?

A. About 30 yards.
Q. Where was the engine at the time he pulled the pin?
A. It was there close to the switch——
Q. I mean with reference to yourself?
A. It was close to the switch.
Q. And where were you with reference to the point at which he pulled the pin?
A. There were 5 or 6 cars between myself and switch at the time he pulled the pin.
Q. After he had pulled the pin would it have been possible for you to get around and throw the switch?
A. It was impossible.
Q. How far did he go beyond the switch before he stopped his engine?
A. He went to the crossing.
Q. What did you do when the cars passed you?
A. When they passed me I swung onto one.
Q. Why did you get on them?
A. To ride them into the shed.
Q. You thought they were going into the shed?
A. Yes sir.
Q. How near was the first car to the engine when you found that they had taken the other track?
A. About a car and a half length.
189 Q. Did you make every effort to set the brakes as quickly as possible?
A. Yes sir, and did set two.
Q. Did you see him standing back of the engine before the cars struck?
A. Yes sir. He was standing stooping over punching his fire with one foot on the inside and the other on the outside of the rail.
Q. Now that morning you had worked there from 6:00 to 9:00 and had he pulled any of the pins to make that flying switch?
A. That was my first trip out to meet that train that morning, so I do not know how he had been handling them.
Q. Was there anyone close enough to the switch to have turned it after he had pulled the pin?
A. No sir, there was not.
Q. Do you live at Bauxite?
A. Yes sir.
Q. Does your family live here?
A. No sir.
Q. Where do they live?
A. At Cypert, Phillips County, Arkansas.
Q. As I understand you, after the engineer pulled that pin there was no possible way for those cars to have gone anywhere else except on the same track with the engine?
A. No sir.
Q. Did you notice if there was a brakeman on the train?
A. Yes sir.

Q. Where was he standing?
A. On the back end of the train; on the last car.
Q. It would have been impossible for him to have pulled the pin?
A. Yes sir.
Q. Was there anything the matter with the engine, track, cars or switch?
190 A. Nothing that I know of.
Q. The brakes on the cars were working all right?
A. Yes sir.

S. S. McGLOFLIN.

Sworn to and subscribed before me, a Notary Public in and for the County of Saline, State of Arkansas, this 16 day of July 1907.

[SEAL.] J. J. BEAVERS,
Notary Public.

Commission Expires March 27, 1909.

This was all the evidence introduced by the defendant at the trial, whereupon it rested.

191 *Testimony of B. G. Bullock.*

The plaintiff, to further maintain the issues in his behalf, introduced the following witness in rebuttal:

B. G. BULLOCK, being duly sworn, testified as follows:

Q. Where do you live?
A. In Shaw township.
Q. Do you know Houston Ramsey, the plaintiff in this case?
A. Yes.
Q. Do you know Bob Page?
A. Yes.
Q. Do you remember the occurrence at Bauxite at the reduction plant where Ramsey's leg was crushed so that it had to be amputated?
A. Yes.
Q. Were you present at that place on that day?
A. On the night of that day.
Q. The night of that day when you got there?
A. Yes.
Q. About what time?
A. Between seven and eight o'clock, I guess, when I got there.
Q. In June?
A. Yes.
Q. State whether or not you had a conversation with Bob Page at that time?
A. Yes.
Q. Where was it?
A. We were right out in front of the doctor's office; Dr. Morris's

office, where Houston Ramsey was at, right up there. Bob Page was standing there. When I first walked up there I spoke to him, and asked him how the boy was getting along. He said, "I could not tell you. He seems to be suffering considerably." He said "I take the whole blame upon myself." He said, "When Houston gave the signal that he was going to cut loose——

192 Mr. LOUGHBOROUGH: When Page was on the stand, he was asked if he did not state to this witness that he would take the whole blame upon himself, and he said that he did not. It seems the witness is going further to detail some further conversation that Page wasn't asked about. (Page's testimony in this particular was here read to counsel and the court.)

Q. State whether or not at that time you have now testified about at that place Bob Page said to you in substance that he took the whole blame upon himself, that he was standing by the switch when the engine passed, stepped on the cars and rode to within about four feet of Houston before he realized what he was there for.

A. He just told me this: "I was standing on the coal box when Houston gave the signal that he was going to cut loose to make the flying switch; I walked across the track and put my foot on the switch, and stood there until the engine ran by, and as the cars came by I caught on the cars and was in four feet of that boy before ever I thought what I was there for, and for that reason I take the whole blame upon myself." That's just what Bob told me.

Cross-examination:

Q. Where was that?
A. At Bauxite.
Q. At what place?
A. In front of the doctor's office. Dr. Morris' office.
Q. Who was there besides you?
A. There were two or three standing around there.
Q. Give their names?
A. Jim Paris was standing there for one.
Q. He is here?
A. Yes.
Q. Who else?

A. I don't know who else was there, standing right there
193 then. I don't know whether Albert Chambers was right there then or not, or just walked away.

Q. Who else?
A. I don't know. There were several standing around.
Q. The only ones you remember are——
A. Jim Paris and I think Albert Chambers was standing with him. I will not be positive that he was there then or just turned away from there.
Q. Do you remember anything else talked about on that occasion?
A. No; there wasn't anything else said there at all until Bob turned and walked away.
Q. But you claim to have recalled the exact words used that night?

A. Yes I know what Bob said.
Q. Just the exact words?
A. That's just exactly what Bob said when I walked up, for I had ıst got there.
Q. That was back in June, 1907?
A. Yes I had come to Little Rock that day and had gone home nd had come back up there that night.
Q. Who did you first tell about this?
A. I don't recall who.
Q. Who did you tell about it?
A. I told Mr. Armistead about it.

194 EXHIBIT "H" TO BILL OF EXCEPTIONS.

STATE OF ARKANSAS,
County of Saline, ss:

I, W. M. Steed, Clerk of the Circuit Court within and for Saline County in the State of Arkansas, hereby certify that I have examined, weighed and measured the draw-bar referred to in the testimony of C. M. Culp, a witness for defendant in the case of George H. Ramsey versus the Aluminum Company of America, pending in the Saline Circuit Court, said draw-bar being referred to as attached to bill of exceptions and marked exhibit "H" thereto, and find that same is a piece of iron 27¾ inches long, 1 inch in thickness, 4 inches wide and weighs 26 pounds, and has a round hole in one end measuring 2 inches in diameter, and an oblong hole in the other end measuring 4½ inches the long way and 2 inches the other way.

In testimony whereof, I have hereunto set my hand as such Clerk and affixed the seal of said Court on this 20th day of June, A. D. 1908.

[SEAL.] W. M. STEED, *Clerk.*

195 Q. How long ago?
A. I told him last Friday.
Q. Is that the first he knew of it?
A. The first that ever I told him of it.
Q. Who else had you told besides Mr. Armistead?
A. I don't know who all I might have said it to.
Q. You didn't tell Mr. Ramsey's attorneys about it until Friday?
A. That was the first I told him about it.
Q. Those words stuck in your mind all that time?
A. Yes they did.

Redirect examination:

Q. Mr. Ramsey who was present is the father of Houston?
A. Yes.
Q. You don't know who he told about it?
A. No I don't know nothing about who he told?
Q. You don't know whether he told him last summer?
A. No, I don't know who he told about it.

Recross-examination:

Q. What relation are you to Ramsey?
A. None in the world.
Q. Do you live down there by them?
A. Yes.
Q. You are good friends?
A. I have nothing against them.
Q. You are good friends?
A. Yes.

The plaintiff hereupon rested his case.
This was all the evidence introduced by either side in the cause.

196 The plaintiff thereupon asked the court to declare the law as follows, to-wit:

Declarations of Law Asked by Plaintiff.

I.

You are instructed that while an employé assumes all the risks and hazards usually incident to the employment he undertakes, he does not assume the risk of the negligence of the company for whom he was working or any of its servants. In other words, he has a right to assume not only that the master will perform its duty, but he has a right to assume that each of the other servants will perform their duty, and if, while in the exercise of ordinary care, he is injured, either by the negligence of the master for whom he works or by the negligence of any other servant of the master, he has a right to recover, and if you find from the evidence in this case that the plaintiff, Ramsey, while in the exercise of ordinary care, relied upon the other servants performing their duties, and was injured by the negligence of some other servant, your verdict must be for the plaintiff.

II.

You are instructed that negligence is the doing something that a man of ordinary prudence would not do under the circumstances, or the failure to do something which a man of ordinary prudence under the circumstances would do, and if you find from the evidence in this case that Ramsey was doing what a man of ordinary prudence would have done under the circumstances, he is not guilty of contributory negligence and your verdict must be for the plaintiff.

III.

You are instructed that contributory negligence cannot be presumed but must be proven, and the burden of proving it is on the defendant.

197 IV.

If you find for the plaintiff in assessing his damages, you may take into consideration his pain and suffering, both mental and

hysical, caused by the injury, if any is proven, his probable future uffering as a result of the injury, if any future suffering appears rom the evidence to probably result from the injury, and his ex- enses for medical attendance caused by the injury, if any are roven.

V.

If you find that the plaintiff, while in the excercise of ordinary are upon his part, was injured by reason of the carelessness or mission of duty of the defendant, its servants or employees, you ill find for the plaintiff.

To the giving of Instructions Numbered I, II, III, IV, and V, s asked by the plaintiff, the defendant at the time separately bjected to each, but the court, overruling said several objections s to said Instructions numbered I, II, III, IV, and V, gave the ame as the law of the case, whereupon the defendant, at the time, aved its several separate exceptions to the giving of said Instruc- ions numbered I, II, III, IV, and V, and now tenders its Bill of Exceptions.

198 The defendant then asked the court to declare the law as follows:

Declarations of Law Asked by Defendant.

I.

Your verdict will be for the defendant.

II.

You are instructed that the mere fact that plaintiff was injured while in defendant's employ, or was injured about the works of defendant, creates no liability upon defendant to pay for any damages he may have suffered; nor is there any presumption that because of such injury defendant or any of its agents or servants was negligent and is responsible therefor, but the burden of proof is on the plaintiff to establish by a preponderance of the evidence that his injury and damage were caused by the negligence of defendant.

III.

You are instructed that contributory negligence is the failure to use that degree of ordinary care and caution to avert injury to himself which would be used by an ordinary prudent person under the circumstances; and if you find from the evidence that plaintiff failed in any respect to use that degree of care and caution which an ordinary prudent person would use under the circumstances and that his failure to use such care contributed to cause his injury, so that but for his concurring negligence the injury would not have happened, your verdict will be for the defendant, and by ordinary care is meant the exercise of reasonable diligence, and implies such watchfulness, caution and foresight as under all circumstances of the particular service would be exercised by ordinary careful and prudent persons.

IV.

If the plaintiff was careless or negligent in any degree, and
199 his carelessness or negligence contributed to cause his injury, your verdict will be for the defendant.

V.

Even though defendant's agents or employés may have been guilty of negligence which caused plaintiff's injury, still if plaintiff was guilty of any carelessness or negligence which contributed in any degree to cause his injury, so that but for his concurring negligence the accident would not have happened, your verdict will be for the defendant.

VI.

You are instructed that the operation of trains and working on and about tram-road tracks are necessarily dangerous; and a person working about moving trains and about tracks where trains are being moved is bound to use care and watchfulness commensurate with his dangerous surroundings to avoid injury to himself.

VII.

If you find from the evidence that the plaintiff was operating an engine on defendant's tram-way and that the tram cars were coupled to the engine and were being drawn by it, and that in an effort to get the cars upon a different track than the engine a flying switch was made by plaintiff, that is, the cars were uncoupled from the engine and the engine run ahead of the moving cars upon a side track, it being designed that other employees of defendant should turn the switch and let the cars following the engine on to another track than the engine; and you find that the engine was uncoupled from the tram cars and run ahead of them past the switch, and was stopped a short distance from the switch, and that plaintiff le-t his engine cab and, without looking to see whether the cars had taken the switch for another track than the one the engine was on, stood behind
200 his engine upon the track on which the engine was standing with his back to the moving cars; and if you find that the string of tram cars followed on the same track as the engine and collided with it and injured plaintiff, you are instructed that the plaintiff was guilty of contributory negligence in thus standing on the track behind the engine with his back to the cars coming towards him, and your verdict will be for the defendant; although you may further find that one of the defendant's employés was at the switch after the engine had passed it and before the cars passed it and in time to have turned the switch and sent the cars along another track, but because of his negligence failed to do so.

VIII.

If you find from the evidence that the fire in the engine which plaintiff was operating could have been attended to by plaintiff by remaining on the engine, but that instead of remaining on the en-

gine to attend to the fire he got off of the engine and stood behind it upon the track and thereby was injured, you are instructed that plaintiff placed himself in a dangerous position needlessly and was guilty of contributory negligence, and your verdict will be for defendant.

IX.

If you find from the evidence that plaintiff knew that the tram cars were coming down the track behind his engine, it was his duty to ascertain that the cars left the track on which the engine was standing and went on the switch before he placed himself in a position of danger behind his engine; and if you find from the evidence that plaintiff got upon the track behind his engine and failed to look or ascertain that the cars behind him had taken the switch and left the track on which his engine was, and that if he had looked or used his senses to ascertain where the cars had gone, he would
201 have learned that they did not go upon the switch, you are instructed that he was guilty of negligence in thus exposing himself to danger and that such negligence caused or contributed to cause his injury, and your verdict will be for the defendant.

X.

If you find from the evidence that plaintiff got on the track behind the moving cars and turned his back upon them and did not use the ordinary care of a reasonably prudent person to ascertain that the cars had not gone upon the switch, you are instructed that he was guilty of negligence in thus exposing himself to peril; and you are instructed that plaintiff would not have the right to rely absolutely upon the switch being tuned at the proper moment to allow the cars behind the engine to take the side track to such an extent that he might place himself in a position of danger on the track on which the engine was, if the cars did not take the side track, although you may find from the evidence that defendant's employé was at the switch when plaintiff's engine passed it and plaintiff thought that such switchman would have time to, and would turn the switch before the cars reached it.

XI.

If you find from the evidence that immediately preceding the time of the occurrence of the accident complained of in this suit, plaintiff was in charge of defendant's engine and a string of tram cars, and that as he approached the switch leading to the shed of defendant's mill it was his custom to blow his engine whistle, and thereupon switchmen were sent from defendant's mill to meet the engine and train for the purpose of switching the cars into the mill and of controlling their speed with brakes, and that it was the custom for one of these switchmen to get upon the engine and pull the coup-
202 ling pin connecting the engine with the first car, and thereupon the engine would increase its speed and run ahead of the cars which were coming behind it, the switchman who pulled the coupling pin remained on the engine and getting off at the switch

for the purpose of turning it so the cars could take the siding; and if you find from the evidence that at the time this injury occurred the switchman did not reach his engine in time to make the switch as described, and thereupon he uncoupled the engine from the train of tram cars himself and increased the speed of his engine and ran ahead of the cars, and did not use care to ascertain whether the switchmen whose duty it was to turn the switch was at the switch, but proceeded and after passing the switch got on the track behind his engine on with his engine, and that if he had looked when passing the switch he would have seen that no one was there to turn it, you are instructed that his injury is due to his own fault and neglect, and your verdict will be for the defendant.

XII.

You are instructed that there is no evidence in this case that the engine, cars, brakes, switch, or track of the defendant company was out of repair; and there is no evidence in this case of any negligence on the part of the defendant, or its agents or employés in this respect.

XIII.

If you find from the evidence that in order to make the flying switch, such as was customary at defendant's plant and as described in evidence, the time in which the person throwing the switch had to perform his duty was short, and the person throwing the switch had to act with promptness in order to have the switch thrown in time for the cars to take the track to the shed, and that plaintiff knew of this fact, but notwithstanding such knowledge he assumed that the switch would be turned in time for the cars to take
203 the other track, and did not look or make other reasonable effort to ascertain that the switch had not been turned but got upon the track in front of the moving cars and was injured, you are instructed that he had no right to place himself in that position of danger in absolute reliance upon the switch being turned in time to divert the cars, although when he passed the switch with his engine he may have seen some person at the switch who apparently expected to turn it; and if he acted in this manner he was guilty of contributory negligence, and your verdict will be for the defendant.

XIV.

If you find from the evidence that the person whom plaintiff claims was at the switch when he passed with his engine had not been doing that work but a short time and was not experienced in it, and it should have been apparent to plaintiff, as a reasonably prudent man, that there was a possibility that he might not turn the switch exactly right or exactly at the right time; and if you further find that if he did not turn the switch exactly right or at exactly the right time the cars would not take the track to the shed but would follow the engine, then you are instructed that it was contributory negligence for plaintiff to get upon the track behind his engine, or in a place that would be dangerous if the cars did not take the track

to the shed, before he ascertained that the cars had turned on to the other track.

XV.

You are instructed that the tracks on which cars are moving are dangerous, and that it is the duty of persons having occasion to go upon tracks, to make use of their senses to ascertain that no moving trains are near which may do them harm; and it was the duty of plaintiff before getting upon the track to use such care as a prudent person under the circumstances would use to ascertain if any moving cars were on the track on which he was standing that
204 might possibly cause his injury, and if you find that he failed to keep such a lookout as a prudent person under the circumstances would keep on such moving cars, and that by reason of such failure, he was injured, your verdict will be for the defendant, even though you may find that some of defendant's other employés were guilty of negligence.

XVI.

If you find from the evidence that it was not plaintiff's duty to uncouple the engine from the cars and that his doing so made the drop switch more dangerous and contributed in any degree to cause his injury, so that but for his contributory negligence the accident would not have happened, then his act was contributory negligence, and your verdict will be for the defendant.

XVII.

If you find from the evidence that it was plaintiff's custom and duty, when making trips from the Martin mine, to stop his train and wait until the switchmen came from the mill to assist in switching the cars and that he failed to stop his train and wait for the switchmen to arrive at the train to assist in making the switch, that was attempted before his injury, and that his conduct in this respect contributed in any degree to cause his injury, so that without his concurring negligence the accident would not have happened, your verdict will be for the defendant.

XVIII.

If you find that plaintiff was guilty of any careless conduct, no matter how slight it might have been, that contributed in any degree to cause his injury, so that without such concurring negligence of plaintiff he would not have been injured, your verdict will be for the defendant, even though you may find that defendant was
205 guilty of negligence.

XIX.

If you find that plaintiff was guilty of any carelessness in leaving his engine to fix its fire under the circumstances that he did, and that such carelessness contributed in any degree to cause his injury, and that without his carelessness the injury would not have

been suffered, your verdict will be for the defendant, even though you find that defendant was also careless in not having the switch turned in time to avert the accident.

XX.

If you find that plaintiff was careless in standing on the track in front of the moving cars and that such carelessness contributed in any degree to cause his injury, and that without his concurring negligence the accident would not have happened, your verdict will be for the defendant, even though you may find that defendant was careless in not having the switch turned in time to avert the accident.

XXI.

If you find from the evidence that plaintiff was careless in turning his back on the moving cars, and that such carelessness contributed in any degree to cause his injury, so that but for such carelessness on his part the injury would not have happened, your verdict will be for the defendant, even though you may find that defendant was careless in not having turned in time to avert the accident.

XXII.

If you find from the evidence that plaintiff knew that dirt, coal or other rubbish might — along the track and prevent the turning
of the switch so that it would deflect the cars, even though the
206 switchman did all a reasonable person could do to turn the
switch, his conduct in placing himself on the track in front of the cars, relying upon the switchman to turn the switch, and not ascertaining that the cars did take the switch, was negligence contributing to cause his injury, and your verdict will be for the defendant.

XXIII.

If you find from the evidence that after plaintiff had passed the switch with his engine and had brought it to a stop, before getting to the ground to fix the fire, he looked back and saw that the cars had not passed the switch, and if he had known that the switch was still turned for the track he was on he would not have gotten on the track behind his engine where he was hurt, and that the switch and tracks were in his plain view, and he could have seen that the switch was not turned if he had looked at it or at the tracks at that point, and thereby did not exercise the reasonable care of an ordinary prudent person under the circumstances, your verdict will be for the defendant.

XXIV.

If you find from the evidence that plaintiff was in charge of the movements of the train of tram cars and of his engine and that he had charge of the operation of such engine and cars and could start or stop them when and where he pleased, and controlled the

movement of the cars with his engine at the time the switch was made, and that he had under his direction the brakeman on the cars and the switchman who were to turn the switch, then you are instructed that it was his duty to see that the switchmen performed their duty in the proper switching of the cars, and if he failed to see that the duty of these switchmen was properly performed when he could have seen that it was not by the exercise of the reasonable care of any ordinary prudent person under the circumstances, your verdict will be for the defendant.

207 XXVI.

If you find from the evidence that defendant is a corporation, incorporated under the laws of Pennsylvania for the purpose of manufacturing aluminum, and that it is engaged in the business in this State as a foreign corporation, and that its plant in this State is used for the purpose of mining and drying bauxite; and that in connection with its plant it has a tram-way leading from the mines to its drying plant, and that on said tram-way tram cars are operated, and that some are moved by hand and some are moved with a steam engine; and that said tram-way does not carry freight and passengers for the public, nor does it propose to do so, and is not incorporated for that purpose, nor operated as a railroad or railway company, then you are instructed that the expression "railroad companies operating within this State, whether incorporated or not" used in the Act of the legislature of 1907, approved March 8th, 1907, and known as "The Fellow Servant Law," does not apply to the operation of defendant's tram-way.

XXVII.

You are instructed that the Act of the legislature, approved March 8th, 1907, known as "The Fellow Servant Law," in providing that it shall apply to all corporations but shall not apply to individuals, persons or partnerships, except those engaged in the operation of a railroad or coal mine, denies to this defendant the equal protection of the law, and is in violation of the Fourteenth Amendment to the Constitution of the United States.

XXVIII.

You are instructed that the Act of the legislature of 1907, approved March 8th known as "The Fellow Servant Law," does not apply to defendant.

208 XXIX.

You are instructed that the defendant is not a railway company within the meaning of the Act approved March 8th 1907, which provides that railway companies shall be liable for injuries to one of their employés occasioned by the negligence of a fellow servant.

XXX.

You are instructed that the defendant is not a railway company within the provisions of the Act of February 28, 1893, defining who are fellow servants of railway companies.

(This instruction was withdrawn by defendant on the concession of plaintiff that the act does not apply.)

XXXI.

If you find from the evidence that plaintiff was engineer on defendant's engine, and also that he had control of the operation of the train, that the duty of the brakemen on the train was to set the brakes on the cars and thereby assist in the operation, and that the duty of the switchmen was to turn the switch for the cars to go into the shed, and that the said switchmen and brakemen had no superintendence and control over plaintiff, but that they were all working for defendant for the common purpose of bringing cars from the mines and switching them into defendant's shed, then you are instructed that they are all fellow servants, and plaintiff cannot recover from defendant because of any act of negligence on the part of either of the brakemen or of either of the switchmen.

XXXII.

You are instructed that if you find from the evidence that plaintiff's injury was caused by the acts, or failure to act, of one of defendant's switchmen, plaintiff cannot recover for such injury against the defendant, although the said switchman may have been
209 guilty of negligence which caused the injury and plaintiff may have been without contributory negligence.

XXXIII.

You are instructed that defendant's switchmen were fellow servants with plaintiff, and plaintiff cannot recover against defendant for any negligent acts of his fellow servants.

XXXIV.

You are instructed that, Pipkin, foreman of the mill, was a fellow servant with the plaintiff, and plaintiff cannot recover in this action, even if his injury was caused by the negligence of the said Pipkin.

XX-V.

If you find from the evidence that plaintiff's injury was caused by the negligence of another employé of defendant who was so related to plaintiff in the work they each performed for defendant as to ordinarily be exposed to injuries caused by each other's negligence, your verdict will be for defendant.

XXXVI.

If you find from the evidence that plaintiff's injury was caused by the negligence of another employé of defendant's who was in the

same department of service with plaintiff and neither had superintendence or control over the other in directing his work or in the manner of doing it, your verdict will be for the defendant.

XXXVII.

The testimony of Bullock of any statement made by Page that Page was at fault for the accident or was at the switch in time to turn it, is not admissible as tending to prove that Page was at the switch in time to have turned it and have prevented the acci-
210 dent, but is only admissible as it may affect the credibility of Page.

XXXVIII.

If you find from the evidence that Page was subject to the directions of plaintiff in the making of the switch of cars and that it was the duty of plaintiff to instruct Page how and when to make the switch, but he failed to do so, and his failure to do so contributed to cause his injury, so that but for such failure the accident would not have happened, your verdict will be for defendant.

The plaintiff objected to the giving of instructions numbered I, II, III, IV, V, VII, VIII, IX, X, XIII, XIV, XV, XVI, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXV, and XX-VI, as asked by defendant, and the court gave as the law in the case Instructions numbered III, V, VI, XI, XII, XVI, XVII, XXXVII, as asked by defendant, and refused to give Instruction numbered II as asked by defendant but modified the same by adding thereto at the end thereof "or some one of its agents" and gave the same as modified, to which refusal of the court to give said Instruction numbered II as asked and to the giving of same as modified it saved its exceptions at the time, and the court refused to — Instructions numbered I, IV, VII, VIII, IX, X, XIII, XIV, XV, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXVI, XXVII, XXVIII, XXIX, XXXI, XXXII, XXXIII, XXXIV, XXXV, XXXVI, and XXXVIII, as asked by defendant, to which refusal of the court to give each of said last named instructions the defendant at the time saved its several exceptions, and now tenders its Bill of Exceptions.

These were all the Instructions asked refused and given in the cause, and all the exceptions saved thereto.

Instruction No. 38, supra, was asked after plaintiff had his opening argument to the jury and after one of the counsel for defendant had replied thereto but before the other attorney of counsel
211 for defendant had argued and before the closing argument of plaintiff and submission of the case to the jury, the other instructions having been settled prior to any argument; the court giving as one of his reasons for refusing the instruction that it was not offered when the other instructions were requested.

These are all the instructions asked, refused and given in th case, and all the exceptions saved thereto.

On Tuesday, March 10th, 1908, after hearing the argument c counsel and the instructions of the court, the cause was submitte to the jury, which retired to consider its verdict, and after consid ering the same returned into open court the following verdict to wit: "We, the jury, find for the plaintiff and assess damages a $20,320.00 C. H. Medlock, Foreman."

And on the same day the defendant filed its motion for new trial said motion for new trial being as follows:

212 *Motion for New Trial.*

In the Saline Circuit Court.

GEO. H. RAMSEY
vs.
ALUMINUM COMPANY OF AMERICA.

Comes the defendant and moves the court for a new trial herei and says:

1. The court erred in giving to the jury each of the instructio requested by plaintiff numbered I, II, III, IV, V.

2. The court erred in modifying defendant's request for instru tions numbered II, and erred in giving said instruction as modifie

3. The court erred in refusing to charge the jury as requested b the defendant in each of its instructions numbered, I, IV, VI VIII, IX, X, XIII, XIV, XV, XVIII, XIX, XX, XXI, XXI XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XX XXXI, XXXII, XXXIII, XXXIV, XXXV, XXXVI, an XXX-III, and erred in refusing to give each of said instructions.

4. The verdict is excessive. Wherefore defendant prays that i be granted a new trial herein.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH, *For Defendant.*

Endorsed: Filed March 10th, 1908. W. M. Steed, Clerk.

213 *Motion for New Trial Overruled.*

And on the same — to-wit: March 10th, 1908, the court havin considered the motion for new trial, overruled the same, to whic action of the court the defendant at the time excepted and asked tha its exceptions be noted of record, which was done and the defendan was allowed ninety days in which to file its bill of exceptions.

214 *Judgment.*

The following judgment was entered by the court:

Judgment.

GEO. H. RAMSEY
vs.
ALUMINUM COMPANY OF AMERICA.

Verdict for $20,320.00.

On this day comes the parties to this cause by their respective attorneys, comes also the jury heretofore empaneled herein, the argument of counsel is concluded, and the jury after receiving the instructions of the court, retire to consider of their verdict. And afterwards on the same day returned into open court the following verdict, to-wit: "We, the jury, find for the plaintiff and assess damages Twenty Thousand and three hundred and twenty Dollars, $20,320.00. C. H. Medlock, Foreman."

It is therefore considered, ordered and adjudged by the court that the plaintiff, Geo. H. Ramsey, do have and recover of and from the defendant, Aluminum Company of America, the sum of Twenty Thousand, Three Hundred and Twenty ($20,320.00) Dollars as his judgment herein and all cost in and about this cause expended, for which execution may issue.

On this same day the defendant, by its attorneys, files *their* motion for new trial herein, which said motion was by the court overruled, to which ruling of the court in overruling said motion for new trial, said defendant excepted and asked that *their* exceptions be noted of record which is accordingly done.

Defendant prays an appeal to the Supreme Court, which appeal is by the court granted and said Defendant is given ninety (90) days from this date in which to prepare, tender and file its Bill of Exceptions.

215 *Judge's Certificate.*

Certificate.

On this day, being within the time allowed by the court for the filing of the bill of exceptions herein, is presented by defendant its bill of exceptions herein, setting forth all of the evidence introduced by both parties in this cause, and all request- for instructions in behalf of both plaintiff and defendant, and showing with the request- for instructions all instructions given and refused in this cause and all motions and other matters, and the same having been examined by the court and found correct in all respects, it is therefore approved.

This June 3rd, 1908.

W. H. EVANS,
Judge of the Seventh Judicial Circuit.

Endorsed: Presented and filed in my office on the 3rd day of June A. D. 1908, at 4 o'clock P. M. W. M. Steed, Clerk of the Circuit Court.

216 *Fee Bill.*

In the Saline Circuit Court.

No. 1138.

GEORGE H. RAMSEY, Plaintiff,
vs.
ALUMINUM COMPANY OF AMERICA, Defendant.

Fee Bill.

W. M. Steed, Clerk				$90.60
L. A. Hockersmith, Sheriff Saline County				25.20
C. C. Kavanaugh, Sheriff of Pulaski County				1.30
M. C. House, Sheriff of Lonoke County				2.80
J. A. Poe, Sheriff of Grant County (pd. by D'f't)				2.60
George H. Ramsey (Judgment)				20,320.00
Saline County (County Tax)				3.00
Bob Page	Witness	5 days		7.50
J. E. Johnson	"	6 "		9.00
D. L. B. Thompson	"	5 "		7.50
Sam McGloflin	"	2 "	and 175 miles	20.50
A. L. Croxton	"	4 "		6.00
J. L. Parris	"	6 "	and 50 miles	14.00
J. F. Raper	"	5 "		7.50
A. H. Lane	"	4 "		6.00
B. G. Bullock	"	5 "		7.50
C. H. Brotherton	"	4 "		6.00
T. E. Page	"	5 "	and 120 miles	19.50
Henry Holland	"	3 "		4.50
A. H. Pipkin	"	4 "		6.00
C. M. Culp	"	3 "		4.50
H. A. Chambers	"	3 "		4.50
Total				$20,576.00

217 *Clerk's Certificate.*

STATE OF ARKANSAS,
County of Saline:

I, W. M. Steed, Clerk of the Circuit Court within and for the County of Saline in the State of Arkansas, do hereby certify that the annexed and foregoing pages contain a true and complete transcript of the complaint, statement as to service of summons, motion to make complaint more specific, answer, demurrer to plea of contributory negligence, amended answer, amendment to answer in response to

notion that it be made more specific, motion for continuance, bill of exceptions, fee bill and all papers and record entries in said cause, as herein set forth, and as same appears of record on pages 497, 500, 508, 513, 517, 518, 520, 526, 532, 533 and 535, in volume "F" Common Law Record, Saline County, Arkansas.

In testimony whereof, I have hereunto set my hand as such Clerk, and affixed the seal of said court, on this 22nd. day of June, A. D. 1908.

[SEAL.] W. M. STEED, *Clerk.*

218 *Filing in Supreme Court.*

In the Supreme Court of Arkansas.

No. 418.

ALUMINUM COMPANY OF AMERICA, Appellant,
vs.
GEORGE H. RAMSEY, Appellee.

We enter the appearance of appellee to this appeal.
MEHAFFY, WILLIAMS & ARMISTEAD,
Attorneys for Appellee.

July 10, 1908.

Filed July 10th, 1908.

P. D. ENGLISH, *Clerk.*

219 *Motion for Subpœna Duces Tecum.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday of May, A. D. 1908, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 13th day of July, 1908, a day of said term:

No. 418.

ALUMINUM COMPANY OF AMERICA, Appellant,
vs.
GEO. H. RAMSEY, Appellee.

Appeal from Saline Circuit Court.

Being fully advised, the appellant's motion for a subpœna duces tecum is by the court sustained, and it is ordered that such subpœna issue as prayed.

220 *Setting Cause for Oral Argument.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of November, A. D. 1908, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 25th day of January, A. D. 1909, a day of said term:

No. 418.

ALUMINUM COMPANY OF AMERICA, Appellant,
vs.
GEO. H. RAMSEY, Appellee.

Appeal from Saline Circuit Court.

On request of parties this cause is set for oral argument February 1st, 1909.

221 *Submission.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of November, A. D. 1908, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 1st day of February, 1909, a day of said term.

No. 418.

ALUMINUM COMPANY OF AMERICA, Appellant,
vs.
GEO. H. RAMSEY, Appellee.

Appeal from Saline Circuit Court.

This cause being regularly called, come the parties thereto by their attorneys and said cause is submitted to the court upon the transcript of the record and the briefs filed and oral argument of counsel, and is by the court taken under advisement.

222 *Judgment.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth

day of November, A. D. 1908, at the Courthouse in the City of e Rock, the following proceedings were had, to-wit: On the 1st of March, 1909, a day of said term:

No. 418.

ALUMINUM COMPANY OF AMERICA, Appellant,
v.
GEO. H. RAMSEY, Appellee.

Appeal from Saline Circuit Court.

his cause came on to be heard upon the transcript of the record he Circuit Court of Saline County, and was argued by counsel, consideration whereof it is the opinion of the Court that the ver- and judgment in this cause are excessive; but the evidence being cient to sustain a verdict for $12,000.00 damages.
is therefore ordered that if the appellee will enter a remittitur ain fifteen juridical days of all of said judgment down to Twelve usand Dollars, the same will be affirmed for that amount; other- said judgment will be reversed and remanded.
attle and Wood, J. J. dissent.

Opinion.

In the Supreme Court of Arkansas March 1, 1909.

ALUMINUM COMPANY OF AMERICA
v.
RAMSEY.

Statement by the Court.

George M. Ramsey brought this action against the Aluminum npany of North America to recover damages for physical in- ies alleged to have been received by him, while in the employ- nt of said company, on account of the negligence of one of his ow servants.
The defendant company answered, setting up contributory negli- nce on the part of the plaintiff, as a defense to the action.
The Aluminum Company of North America is engaged in the ning of bauxite in Saline county, Arkansas, and in connection h its plant, operates a narrow *guage* railroad with a trackage of miles which is used for the purpose of hauling the ore from the nes to the drying shed. The equipment of the road consisted of locomotive and about 80 tram cars. The road bed was new and track in good shape at the time the accident in question hap- ned. At the time of the trial in September 1907, George M. Ram- , the plaintiff was nearly 23 years old. He commenced working the company on the 31st day of August 1906. He commenced

to run the engine on the 22nd day of January 1907, and continued to run it up to the time he was injured, which occurred on the 18th day of June, 1907. The shed runs north and south. One track runs east and one northeast. The cars from the northeast track were placed in the shed by kicking them there. From the east track, they were run in by means of a "flying switch." There was no "Y" or turntable. When the cars came in from the Martin mine they were run in the shed by means of the flying switch, and were unloaded there. The customary manner of making the flying switch is described as follows: The locomotive was in front of the cars, coming from the mines, and when it arrived at a big cut about 200 yards from the switch, the engineer would blow the whistle. In response to this signal, two employees of the company would come out of the car sheds, go down along the track and jump on the moving cars to assist in bringing them in. One of them would
224 jump on the engine to pull the pin for the flying switch when the engineer gave the signal. The switch was always left open so that engine could take the right hand track, which led around to the end of the shed. After the engine passed the switch, the switch would be thrown so that the cars would take the left hand track, which led into the shed to the ore bins. When in about 50 yards of the switch, the engineer would check the speed of the engine, and this would cause the coupling between the engine and the car next to it to slacken so that the pin could be pulled. The engineer would, then, increase the speed of the engine so that it could pass the switch and get on the right hand track ahead of the cars. When the engine reached the switch, the man on the engine with the engineer would jump off the engine and throw the switch in order to place the cars on the left hand track leading to the sheds. The switchman would then jump on the moving cars to assist the brakeman in setting the brakes so as to stop them at the ore bins. The engine was a small one and had no tender. The train crew consisted of the engineer and a brakeman, sometimes the brakeman pulled the pin to make the flying switch, but he usually rode on the rear end of the train of cars so that if the train broke he would be in a better position to control the cars which had broken loose from the engine.

The accident happened on the second trip that had been made on the morning of its occurrence. The brakeman was riding on the rear end of the train and the signal for the switchman to come to throw the switch was blown in the cut as usual. When the engine arrived at a point about 50 yards from the switch the engineer pulled the pin to uncouple the cars from the locomotive. When the plaintiff got back on his feet after pulling the pin, and looked ahead, McLaughlin was walking up the track toward the engine about ten steps away and Page was standing at the switch with his foot on the sill. McLaughlin and Page had come out of the shed for the purpose of throwing the switch and of assisting the brakeman in stopping the cars at the ore bins in the shed. It was the duty of Page to throw the switch. The engine was about 40 yards ahead of the

cars when it passed the switch. As it passed McLaughlin
225 and Page, plaintiff said: "You come out here next time and pull this pin. We are in a hurry this morning. I don't want to pull the pin another time. I pulled it last time." They said, "all right." Plaintiff rolled the engine down to the road crossing and stepped off right behind it when it stopped. He grabbed the clinker hook and turned around. The cars were then within ten steps of the switch. Page was standing at the switch but plaintiff did not notice whether the switch had been thrown or not. He was in a hurry and had stepped down to attend to the fire in his engine. Just as he raised up, the cars ran into him, knocked him down and up against the engine. The cars were moving at the speed of 7 or 8 miles per hour. When the cars hit him, McLaughlin was four car lengths from the first car and Page was behind him at the switch. Plaintiff was both engineer and fireman. It was necessary for him to rake the fire and to get out the clinkers to get up steam enough to move the engine back up the grade. He said that he could not do this work in any other position than that assumed by him at the time of the injury. That the work could not be done from the boiler because the platform from behind the end of it was only two feet wide, and the fire would burn him if he stood so close; and that besides this, in standing on the platform he could not get the clinker hook down in the fire. That he could not do this work from either side of the engine because there was no opening into the fire box on either side, and that in consequence thereof he had to stand right in front of the door and in the middle of the track to do the work. The plaintiff gave the signal for the men to come out to throw the switch when he was about 200 yards from it, and it was his duty to direct when the flying switch was to be made. When he gave the signal, it was the duty of one of the men to pull the pin and after the engine passed the switch, it was the duty of the other to throw the switch. Plaintiff relied upon Page to throw the switch. Plaintiff's leg was crushed so badly that it had to be amputated.

The above is the substance of the testimony of the plaintiff detailing the circumstances relating to the injury.

226 On cross examination he stated that sometimes in making a flying switch you split the switch. That sometimes it happens that a piece of coal or wood will get into the switch and prevent its being thrown. That if he had looked a few seconds longer he could have seen whether the cars took the left hand track but that he could almost have the engine hot in that time and that he was in a hurry.

On redirect examination he testified that the track on which he was injured was so curved that he could not tell from where he was, whether the switch was open or shut. That the switch bar was small and flat on one side or the other as the switch is open or shut. That at the time of the injury he was absorbed in getting the engine ready to go back to the mine. That if there was a piece of coal in the switch, the man at the switch could have told it better than he,

and that if the switch failed to work could have notified him of that fact by hollowing to him as he was only 5 or 6 car lengths away.

R. L. Page for the defendant testified:

I am 23 years old and reside at Bauxite, Arkansas, and work for the defendant. I have been at work for that company about one year. I was working for it when Ramsey was hurt. We always made a drop of the cars, or flying switch when bringing ore from the Martin mine. The engine would pull the cars down and then we would meet them. One of us was supposed to get on the cars and cut the engine off and ride the engine to the switch, the engine taking the right hand track, drop off and turn the switch for the main line so that the cars would run on into the shed. Always two of us went out to meet the train. When it whistled on this occasion Sam McLaughlin and I went out. I ran past the switch stand and as the engine ran pan me Ramsey said, "Bob I want you to be here next time to pull this pin." I said "All right Houston I will." That was about twenty yards from the switch stand. I ran on east and caught the cars, getting on the fourth car, and McLaughlin caught on about four cars back of me. I was about twenty yards from the switch when the engine passed me, and proceeded to run east until I climbed on the cars. I was on the left hand side of the track, the side the switch is on. I did not stop after leaving
227 the switch. Mr. Pipkin, the shed foreman, sent us out and we ran until we met the train. McLaughlin and I did not stop and sit on the coal box. There was no one at the switch to throw the switch after the engine passed. I could not have run ahead of the cars to throw the switch and the cars ran into the siding. McLaughlin was on the opposite side of the track. Forrest Raper, the brakeman, was on the last car. I have never known of Ramsey's pulling the pin himself on any other run. Before that it had been the custom for the engineer to stop and wait for us if we did not come out in time to pull the pin and throw the switch. The engine ran about twenty steps beyond the switch before it stopped, stopping on the road crossing. The engine when it passed me was running too fast for me to get on without running a risk of getting hurt. Other evidence was adduced tending to corroborate the testimony of Page.

There was a jury trial and verdict for the plaintiff in the sum of $20,320.00. The defendant has duly prosecuted an appeal to this court.

228 Appellee asked the court to instruct the jury as follows:

I. You are instructed that while an employé assumes all the risks and hazards usually incident to the employment he undertakes, he does not assume the risk of the negligence of the company for whom he was working or any of its servants. In other words, he has a right to assume not only that the master will perform its duty, but he has a right to assume that each of the other servants will perform their duty, and if, while in the exercise of ordinary care, he is injured, either by the negligence of the master for whom he works or by the negligence of any other servant of the master, he has a right to recover, and if you find from the evidence

in this case that the plaintiff, Ramsey, while in the exercise of ordinary care relied upon the other servants performing their duties, and was injured by the negligence of some other servant, your verdict must be for the plaintiff.

II. You are instructed that negligence is the doing something that a man of ordinary prudence would not do under the circumstances, or the failure to do something which a man of ordinary prudence under the circumstances would do, and if you find from the evidence in this case that Ramsey was doing what a man of ordinary prudence would have done under the circumstances, he is not guilty of contributory negligence and your verdict must be for the plaintiff.

III. You are instructed that contributory negligence cannot be presumed but must be proven, and the burden of proving it is on the defendant.

IV. If you find for the plaintiff in assessing his damages, you may take into consideration his pain and suffering, both mental and physical, caused by the injury, if any is proven, his probable future suffering as a result of the injury, if any future suffering appears from the evidence to probably result from the injury, and his expenses for medical attendance caused by the injury, if any are proven.

229 V. If you find that the plaintiff, while in the exercise of ordinary care upon his part, was injured by reason of the carelessness or omission of duty of the defendant, its servants or employés you will find for the plaintiff.

These instructions were given over the objections of appellant.

At the request of appellant, the court gave the following instructions:

II. You are instructed that the mere fact that plaintiff was injured while in defendant's employ, or was injured about the works of defendant, creates no liability upon defendant to pay for any damages he may have suffered; nor is there any presumption that because of such injury defendant or any of its agents or servants was negligent and is responsible therefor, but the burden of proof is on the plaintiff to establish by a preponderance of the evidence that his injury and damage were caused by the negligence of defendant.

III. You are instructed that contributory negligence is the failure to use that degree of ordinary care and caution to avert injury to himself which would be used by an ordinary prudent person under the circumstances; and if you find from the evidence that plaintiff failed in any respect to use that degree of care and caution which an ordinary prudent person would use under the circumstances and that his failure to use such care contributed to cause his injury, so that but for his concurring negligence the injury would not have happened, your verdict will be for the defendant, and by ordinary care is meant the exercise of reasonable diligence and implies such watchfulness, caution and foresight as under all circumstances of the particular service would be exercised by ordinary careful and prudent persons.

V. Even though defendant's agents or employés may have been

guilty of negligence which caused plaintiff's injury, still if plaintiff was guilty of any carelessness or negligence which contributed in any degree to cause his injury, so that but for his concurring
230 negligence the accident would not have happened, your verdict will be for the defendant.

VI. You are instructed that the operation of trains and working on and about tram-road tracks are necessarily dangerous; and a person working about moving trains and about tracks where trains are being moved is bound to use care and watchfulness commensurate with his dangerous surroundings to avoid injury to himself.

XI. If you find from the evidence that immediately preceding the time of the occurrence of the accident complained of in this suit, plaintiff was in charge of defendant's engine and a string of tram cars, and that as he approached the switch leading to the shed of defendant's mill it was his custom to blow his engine whistle, and thereupon switchmen were sent from defendant's mill to meet the engine and train for the purpose of switching the cars into the mill and of controlling their speed with brakes, and that it was the custom for one of these switchmen to get upon the engine and pull the coupling pin connecting the engine with the first car, and thereupon the engine would increase its speed and run ahead of the cars which were coming behind it, the switchmen who pulled the coupling pin remained on the engine and getting off at the switch for the purpose of turning it so the cars could take the siding; and if you find from the evidence that at the time this injury occurred the switchman did not reach his engine in time to make the switch as described, and thereupon he uncoupled the engine from the train of tram cars himself and increased the speed of his engine and ran ahead of the cars, and did not use care to ascertain whether the switchman whose duty it was to turn the switch was at the switch, but proceeded and after passing the switch got on the track behind his engine, and that if he had looked when passing the switch he would have seen that no one was there to turn it, you are instructed that his injury is due to his own fault and neglect, and your verdict will be for the defendant.

XII. You are instructed that there is no evidence in this case that the engine, cars, brakes, switch, or track of the defend-
231 ant company was out of repair; and there is no evidence in this case of any negligence on the part of defendant, or its agents or employés in this respect.

XVI. If you find from the evidence that it was not plaintiff's duty to uncouple the engine from the cars and that his doing so made the drop switch more dangerous and contributed in any degree to cause his injury, so that but for his contributory negligence the accident would not have happened, then his act was contributory negligence, and your verdict will be for the defendant.

XVII. If you find from the evidence that it was plaintiff's custom and duty, when making trips from the Martin mine, to stop his train and wait until the switchmen came from the mill to assist in switching the cars and that he failed to stop his train and wait for the switchmen to arrive at the train to assist in making the switch,

at was attempted before his injury, and that his conduct in this spect contributed in any degree to cause his injury, so that without s concurring negligence the accident would not have happened, ur verdict will be for the defendant.

XXXVII. The testimony of Bullock of any statement made by ge that Page was at fault for the accident or was at the switch time to turn it, is not admissible as tending to prove that Page as at the switch in time to have turned it and have prevented the cident, but is only admissible as it may affect the credibility of ge.

These instructions were given by the court. Other instructions ere asked by appellant, which were refused. As they will be fficiently set out in the opinion it will not be necessary to do so ere.

32 *Opinion.*

IART, *J.*: (after stating the facts).

1. It is earnestly insisted by counsel for appellant that the first struction asked by him which was peremptory, should have been iven. On this view of the case we must consider the testimony in s most favorable aspect to the appellee, for it is the province of the ury to pass upon the weight of the evidence. With that we have o concern, however greatly we may think it preponderates one way r the other. The test is, could reasonable and fair minded men rom all the facts and circumstances adduced in evidence have ome to different conclusions as to whether or not negligence on the art of appellee might be inferred. If so, the right to draw the in- erence is for the jury. On the other hand, if reasonable minds ould have reached but one conclusion from the evidence, then the uestion of contributory negligence is one of law for the court.

Appellee, when he was injured, was not a trespasser upon the rack. His work required him to be there. He testified that the ngine was so constructed that it was necessary for him to stand n the middle of the track to rake out the clinkers. His work re- uired haste for the rapidity with which he hauled the cars to and rom the mines necessarily facilitated the operation of the mines. It is true that if he had waited a few second-, he could have seen that the switch was not thrown. But he said that the switchman was standing there with his foot on the sill of the switch stand and that it was his duty to throw the switch. He further stated that, at the time of the injury, he was only five or six car lengths away from the switch stand and could have heard a warning cried by the switch- man if the switch had failed to operate. Under these circumstances, we do not think he was necessarily negligent because he did not wait to see if the switch was thrown and the cars took the left hand track before he commenced to fix his fire.

As was said in the case of Rahman v. Minn. & N. W. R'd, 43 Minn. 42. "the law imposed upon him the exercise of ordinary care and prudence, and in considering what this is, under a 233 given state of facts, regard must be had for the danger to be apprehended, the reasonable probability of incurring it, as

well as the natural presumption that other persons will dischar
their duty, and act with due care." See also Henry v. R'y Co.,
Am. St. Rep. 457. This is not a case where the physical facts we
such that reasonable minds must come to the conclusion that a
pellee heedlessly took a position of danger. Certainly, he wou
have been in no danger if the switchman had thrown the swit
as his duty required him to do, or, even if it failed to operate, h
the switchman called out to him that fact, he could have escap
injury. Hence we think from all the facts and circumstances of t
case as they appear from the record that the question of contributo
negligence was one for the jury and that the court was right in r
directing a verdict for the appellant.

2. Instructions nos. 26 to 36 inclusive pass out of the case.

The act of our legislature approved March 8th, 1907, which ab
ishes in this State the common law rule that a servant assum
the risk of negligence of his fellow servant has been sustained
this court in the case of the Ozan Lumber Co. v. Biddie, — A
Law Rep. — decided since the trial of this case in the court belo
Hence, it is not necessary to notice the refusal to give these
structions which were asked by the appellant and which were bas
upon the unconstitutionality of that act, except to say that the op
ion in the case of the Ozan Lumber Co. v. Biddie is in accord w
the modern text writers on the subject and as well the great major
of adjudicated cases.

3. The first assignment of error is based upon the action of t
court in giving instruction No. 1 at the request of appellee. T
instruction is set out in the statement of the case. It is claim
that the language of the instruction was susceptible of the constr
tion that appellee had an absolute right to assume that his fell
servants would do their duty and that it was, therefore, misleadi
and prejudicial.

234 It may be well here to notice the principles of law up
which this instruction is based. The common law doctr
was that a servant assumed the negligence of his fellow servant.
discussing the question of contributory negligence under such c
ditions Mr. Elliott says:

"An employé may, within limits, act upon the assumption t
the employer's duty to exercise ordinary care has been perform
but the fact that the employee may act upon such assumption d
not relieve him from the duty of exercising ordinary care to av
the injury. The presumption that the duties of the employer to
employee have been performed does not authorize the employé
carelessly or heedlessly venture into danger, nor does it relieve h
from the duty of taking knowledge of and guarding against d
gers plainly and fully open to observation." Elliott on Railro
vol. 3 p. 768.

Again the right of the servant to rely on the care of the mas
is thus stated: "Unless the danger is actually known to the serva
or is so obvious and imminent that an ordinarily prudent per
would refuse to incur it, he had a right to rely upon the perfo
ance by the master or his authorized agents, other than his o

fellow servants of the duties imposed upon the master by law for the protection of his servants." 26 Cyc. 1233.

The act of March 8th 1907 of the General Assembly of the State of Arkansas, (Acts of 1907, p. 162) abrogated the common law rule that a servant assumes the risk of negligence of his fellow servant. It is very broad in its terms and in effect provides that in cases of corporations, the master shall be liable to the servant for injuries or death caused by the negligence of any other servant of the master in the same manner and to the same extent as if the negligence causing the injury or death was that of the employer. The rule as to the right of a servant to rely on the exercise of due care by his fellow servants under statutes similar to our fellow servant statute is aptly stated as follows:

235 "While under statutes limiting the fellow servant doctrine, a servant has a right to rely upon the exircise of reasonable care by his fellow servants, this does not absolve him from caring for his own safety, as an ordinarily prudent man would do under like circumstances, and he can not recover for an injury received by reason of the negligence of a fellow servant, if he knew, or, by the exercise of ordinary care might have known thereof." 26 Cyc. 1236 and cases cited. An examination of the cases cited in the text shows that they support the rule as stated. Tested by these principles, we think the instruction was correct. We do not think it is open to the construction that it told the jury that the appellee had an absolue right to assume that his fellow servant would perform his duty regardless of the fact of whether appellee was himself under all the circumstances of the case in the exercise of ordinary care and prudence. We think the effect of the instruction was to tell the jury that the law imposed upon appellee the exercise of ordinary care and prudence, and in determining that question, that the jury might consider the fact that he relied upon his fellow servant performing his duty, at the same time having due regard himself for the danger to be apprehended and the reasonable probability of incurring it.

We do not wish to be understood as approving the instruction in the form in which it was given but if the language was thought to be ambiguous or of doubtful meaning, counsel for appellant should have specifically called the court's attention to that fact, and asked that the instruction be amended instead of making a general objection to it. St. L. I. M. & Sou. R. Co. v. Hoshall, 82 Ark. 391 and cases cited; St. L. I. M. & Sou. R. Co. v. Hardie, 113 S. W. 31, Ark. Law Rep. —. A general objection is insufficient to point out an ambiguity in an instruction. Burnett v. State, 80 Ark. 225, and cases cited.

4. Counsel for appellant insists that the court erred in not giving instruction Nos. 8 and 13. As these instructions are open to the same objection, they may be considered together. They read as follows:

236 VIII. If you find from the evidence that the fire in the engine which plaintiff was operating could have been attended to by plaintiff by remaining on the engine, but that instead

of remaining on the engine to attend to the fire be got off the engin and stood behind it upon the track and thereby was injured, yo are instructed that plaintiff placed himself in a dangerous positio needlessly and was guilty of contributory negligence, and your ver dict will be for defendant.

XIII. If you find from the evidence that in order to make th flying switch, such as was customary at defendant's plant and a described in evidence, the time in which the person throwing th switch had to perform this duty was short, and the person throwin the switch had to act with promptness in order to have the switc thrown in time for the cars to take the track to the shed, and tha plaintiff knew of this fact, but notwithstanding such knowledge h assumed that the switch would be turned in time for the cars t take the other track, and did not look or make other reasonabl effort to ascertain that the switch had not been turned but got upo the track in front of the moving cars and was injured, you ar instructed that he had no right to place himself in that position o danger in absolute reliance upon the switch being turned in tim to divert the cars, although when he passed the switch with hi engine he may have seen some person at the switch who apparentl expected to turn it; and if he acted in this manner he was guilty o contributory negligence, and your verdict will be for the defendant

It will be noted the instructions single out certain facts, and tel the jury, that if they find these facts to exist, appellee was guilty o contributory negligence. The effect of the instructions was to tel the jury if they found the facts stated in them to exist that appelle as a matter of law was guilty of contributory negligence.

"The existence of negligence should be passed upon by the jur as any other fact, and it is improper to instruct them that a certai fact or group of facts amounts to negligence per se, unless such act are declared by law to be negligence per se, or are such a
237 to induce an inference of negligence in all reasonable minds."

29 Cyc. 645 and cases cited; Pauckner v. Waken, et al. (Ill.) 14 L. R. A. (N. S.) 1118; Louisiana & T. Lumber Co. v Brown, 109 S. W. (Tex.) 950.

The instructions as written were peremptory in their nature an took away from the jury the question of contributory negligence Consequently, they invaded the province of the jury, which is neve permissible. Rector v. Robins, 82 Ark. 424; Stephens v. Oppen heimer, 45 Ark. 492; Reed v. State, 54 Ark. 621; Blankenship v State, 55 Ark. 244.

5. Instructions Nos. 7, 9, (10), 14, 22 asked by appellant an refused by the court are open to precisely the same vice as is con tained in instructions Nos. 8 and 13 already discussed. What ha been said in condemnation of them, applies with equal force to th ones here under consideration. No useful purpose can be serve by setting them out in the opinion, and we need only say that th court was right in refusing them for the reasons already given."

6. Counsel for appellant insists that the court erred in not givin instruction No. 15 asked by them. It reads as follows:

XV. You are instructed that the tracks on which cars are mov ing are dangerous, and that it is the duty of persons having occasio

to go upon tracks, to make use of their senses to ascertain that no moving trains are near which may do them harm; and it was the duty of plaintiff before getting upon the track to use such care as a prudent person under the circumstances would use to ascertain if any moving cars were on the track on which he was standing that might possibly cause his injury, and if you find that he failed to keep such a lookout as a prudent person under the circumstances would keep on such moving cars, and that by reason of such failure, he was injured, your verdict will be for the defendant, even though you may find that some of defendant's other employés were also guilty of negligence.

We think this instruction was covered by the other instructions given in the case, particularly by instructions Nos. 3 and 6
238 given at the request of appellant. A comparison of the instructions will show that the same matters embodied in this instruction are substantially embraced in the instructions given. A refusal to give an instruction that is substantially covered by another instruction given is not prejudicial. Fox v. Spears, 78 Ark. 71; Burrow v. City of Hot Springs, 85 Ark. 396.

In the case of Sadler v. Sadler, 16 Ark. 628, English, C. J. speaking for the court said: "A multiplication of instructions, announcing in effect, the same legal principle, tends only to encumber the record, perhaps to confuse the jury, and is not to be encouraged." To the same effect, see Haney v. Caldwell, 43 Ark. 184. This applies with striking appropriateness to cases like the present one where, although the testimony is voluminous, the issues to be submitted to the jury are not complicated, and 38 intructions were requested by the appellant. We may add in this connection that instructions Nos. 4, 18, 19 and 20 are substantially the same as other instructions given by the court, consequently no prejudice resulted to appellant from the refusal of the court to give them.

7. Counsel for appellant assigns as error the refusal of the court to give instruction No. 23 asked by them. It reads as follows:

XXIII. If you find from the evidence that after plaintiff had passed the switch with his engine and had brought it to a stop, before getting to the ground to fix the fire, he looked back and saw that the cars had not passed the switch, and if he had known that the switch was still turned for the track he was on, he would not have gotten on the track behind his engine where he was hurt, and that the switch and tracks were in his plain view, and he could have seen that the switch was not turned if he had looked at it or at the tracks at that point, but he failed to look at the switch or track at that point, and thereby did not exercise the reasonable care of an ordinary prudent person under the circumstances, your verdict will be for the defendant.

239 We think this instruction is open to the objection that the effect of it was to take the question of contributory negligence from the jury. The word "thereby" refers to "but he failed to look at the switch or track at that point" and thus makes appellee's failure to look, contributory negligence as a matter of law. In any event the language used is doubtful or ambiguous, and it is not prejudicial for a trial judge to refuse an instruction which in his

opinion has a tendency by its terms to take from the consideration of the jury a disputed question of fact, and thus mislead them as to the issues submitted to them for their decision.

8. Counsel for appellant assigns as error the action of the court in giving instruction No. 3 at the request of the appellee. There was no error in giving this instruction. In the case of L. R. M. R. & T. Ry. Co. v. Leverett, 48 Ark. 33, the court said "Contributory negligence is a matter of defense. It is not presumed, but must be proved, and the burden of proving it rests on the defendant. This court has ever since adhered to that rule. Jones v. Malvern Lumber Co., 58 Ark. 125.

In the case of Hot Springs Street Railroad Co. v. Hildreth, 72 Ark. 572, the court said: "The burden of proving negligence is on the plaintiff, and of proving contributory negligence is on the defendant, unless it is shown by the testimony of the plaintiff.

The act of March 8th, 1907, commonly known as the fellow servants act makes the master liable for the negligence of all his servants, but it does not take away his defense of contributory negligence, and the rule in regard to the burden of proof is not changed by the terms of the act. Hence we can see no reason for a change of the rule, and adhere to our former rulings in that respect.

9. We now come to the question, was the verdict excessive? This question has given us much concern. It is an extremely difficult and a somewhat delicate matter, in cases like this, to tell when the verdict is, or is not, excessive. It has been frequently said that it is difficult to find a measure of damages for pain, for the obvious reason that none would be an acceptable inducement to
240 suffer it; but when it has occurred, the compensation as such must be considered upon a reasonable basis of estimate. Under our system of jurisprudence, the amount of damages must be left largely to the reasonable discretion of the jury. Again, we may say, it has been repeatedly held that they may not give any amount they please. The appellee in this case was 22 years old at the time of the accident. He had been to school but little, but his testimony shows him to be a man of fair average intelligence. His left leg was injured and had to be amputated about 5½ inches below the hip. He suffered great pain, and lay in the hospital for one month after his leg was amputated. On his return home, he fell and hurt it again so that he had to be carried back to the hospital and remained there for six weeks longer. His medical bill and hospital fees were $386.22. He commenced working for the appellant in August, 1906, and worked for it until the time of the accident. He commenced to run the engine on the 22nd of January, 1907, and was earning $2.40 per day when he was hurt. Prior to his employment by appellant, he had worked for 15 nights in the railroad yards at Hot Springs running a switch engine. This was all the experience he had had in running an engine for pay, prior to his employment by appellant. He said he had learned how to run an engine by riding on railroad locomotives with engineers who were his friends and who would teach him.

Dr. Gann, the surgeon who amputated his leg said that nearly all

ps give a man more or less pain sometime during life, but not sarily in every case.

will be seen that appellee had not followed the occupation of ing an engine on a regular line of railroad, and it is a matter mmon knowledge that he would have had to serve as a fireman re he could obtain such position. His means of earning a liv- n many other occupations is still open to him, and the amount ill recover in this case properly invested will yield an income will materially assist him in providing for his future support.

Everything considered, we think the verdict was excessive, and that the amount recovered should be reduced to $12000.00.

appellee will, within 15 days, remit the amount of damages n to $12000.00, the judgment will stand affirmed; otherwise judgment will be reversed and the cause remanded for a new

r. Justice Battle dissents from the construction we have placed n instruction No. 1 given by the court at the request of appellee upon instruction No. 23 asked by appellant and refused by the t.

r. Justice Wood dissents upon the whole case.

Remittitur Entered.

TE OF ARKANSAS,
In the Supreme Court:

e it remembered, That at a term of the Supreme Court of the e of Arkansas, begun and held on the 23rd day, being the fourth nday of November, A. D. 1908, at the Courthouse, in the City of le Rock, the following proceedings were had, to-wit: On the 8th of March, 1909, a day of said term:

No. 418.

ALUMINUM COMPANY OF AMERICA, Appellant,
v.
GEO. H. RAMSEY, Appellee.

Appeal from Saline Circuit Court.

Comes the appellee by his attorneys and pursuant to the ordered ered herein on March 1st, inst. files and enters a remittitur of all the judgment recovered by him in the lower court in excess of 2,000.00 and prays that judgment of said Circuit — be affirmed for d amount with interest thereon from the date of said judgment.

It is therefore considered by the Court that the judgment of said rcuit Court in this cause rendered be and it is hereby affirmed the sum of Twelve Thousand Dollars with interest thereon from e 10th day of March, A. D. 1908, the date of the judgment of said rcuit Court.

It is therefore considered that said appellant recover of said ap- llee all its costs in this court in this cause expended, and have ecution thereof.

243 *Petition for Rehearing.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of November, A. D. 1908, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 15th day of March, 1909, a day of said term:

No. 418.

ALUMINUM COMPANY OF AMERICA, Appellant,
v.
GEO. H. RAMSEY, Appellee.

Appeal from Saline Circuit Court.

Comes the appellant by attorneys and files a petition for rehearing, with briefs, which being duly served, is submitted, and by the court taken under advisement.

244 *Rehearing Filed.*

In the Supreme Court of Arkansas.

No. 418.

ALUMINUM COMPANY OF AMERICA, Appellant,
v.
GEO. H. RAMSEY, Appellee.

Appeal from Saline Circuit Court.

Petition for Rehearing.

Comes the appellant and respectfully prays that the court grant it a rehearing herein and says:

1. That the court is in error in its construction of the language and meaning of appellant's requests for instruction No. 23.
2. That the court should have held that instruction No. 10 should have been given.
3. That this court should have held that instruction No. 15, or instructions Nos. 19, 20 and 21 should have been given.
4. That the court should have held that instructions Nos. 24 and 38 should have been given.

Wherefore, appellant prays that it have a rehearing herein and that this cause be reversed and remanded for a new trial.

Respectfully submitted.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH, *For Appellant.*

5 *Rehearing Overruled.*

ATE OF ARKANSAS,
In the Supreme Court:

Be it remembered that at a term of the Supreme Court of the ate of Arkansas, begun and held on the 23rd day, being the fourth onday of November, A. D. 1908, at the Courthouse, in the City Little Rock, the following proceedings were had, to-wit: On the nd day of March, 1909, a day of said term:

No. 418.

ALUMINUM COMPANY OF AMERICA, Appellant,
v.
GEO. H. RAMSEY, Appellee.

Appeal from Saline Circuit Court.

Being fully advised the petition for rehearing filed by the ap-llant is by the Court denied.

6 STATE OF ARKANSAS,
In the Supreme Court:

I, P. D. English, Clerk of the Supreme Court of the State of rkansas, hereby certify that the foregoing 245 pages contain a full, ue, and complete transcript of the record and proceedings in said urt in the cause therein stated, with all things concerning the me.

In testimony whereof I hereto set my hand as clerk and affix the al of said court, at my office, in Little Rock, Arkansas, this — ay of April, A. D. 1909.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH, *Clerk.*

7 In the Supreme Court of Arkansas.

No. 518.

ALUMINUM COMPANY OF AMERICA
vs.
GEORGE H. RAMSEY.

Assignment of Errors.

And now comes the Aluminum Company of America, plaintiff in rror, and says that in the record aforesaid there is manifest error, nd it hereby states that the errors therein which it intends to rely n at the hearing are as follows, to-wit;

1. The Supreme Court of Arkansas erred in holding and deciding that the Act of the legislature of the State of Arkansas, approved March 8th, 1907, and entitled, "An Act to give right of action against an employer for injuries or death resulting to his agents, employees or servants, either from the employer's negligence or from the negligence of some of his other employees, servants or agents, and to repeal all acts and parts of acts in conflict herewith," was not repugnant to the Fourteenth Amendment to the Constitution of the United States and that the judgment of the Saline Circuit Court in this cause did not deny plaintiff in error equal protection of the law.

2. The Supreme Court of Arkansas erred in holding and deciding that the act of the legislature of the State of Arkansas, approved March 8th, 1907, and entitled, "An Act to give right of action against an employer for injuries or death resulting to his agents, employees or servants, either from the employer's negligence, of from the negligence of some of his other employees, servants or agents, and to repeal all acts and parts of acts in conflict herewith," was not repugnant to the Fourteenth Amendment to Constitution of the United
248 States, and that the judgment of the Saline Circuit Court in this cause did not deprive plaintiff in error of its property without due process of law, in violation of said amendment.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys for Aluminum Company of America.

Filed March 26, 1909.

P. D. ENGLISH, *Clerk.*

249 ALUMINUM COMPANY OF AMERICA
VS.
GEORGE H. RAMSEY.

Prayer for Reversal.

Inasmuch as the Supreme Court of Arkansas committed error in its judgment and decision herein as set forth in the assignment of errors herewith filed, plaintiff in error prays that the Supreme Court of the United States reverse said judgment.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
For Plaintiff in Error.

250 In the Supreme Court of Arkansas.

No. 518.

ALUMINUM COMPANY OF AMERICA
vs.
GEORGE H. RAMSEY.

Petition for Writ of Error.

To the Honorable Edgar E. McCulloch, Chief Justice of the Supreme Court of Arkansas:

Your petitioner, Aluminum Company of America, respectfully represents that on the 8th day of March, 1909, a final judgment and decision was made and entered by this Court in the above-entitled cause, then pending on appeal herein. That thereafter, within the time allowed by law and by leave of this Court your petitioner filed a petition for rehearing upon said judgment and decision, and that said motion was on the 22nd day of March, 1909, overruled, leaving the said judgment and decision in full force and effect. That in this action your petitioner drew in question the validity of the act of the legislature of the State of Arkansas, approved March 8th, 1907, entitled, "An Act to give right of action against an employer for injuries or death resulting to his agents, employees or servants, either from the employer's negligence, or from the negligence of some of his other employees, servants or agents, and to repeal all acts and parts of acts in conflict herewith," on the ground of it being repugnant to the Constitution of the United States, and the decision of this Court was in favor of its validity.

Your petitioner, considering itself aggrieved by the decision and judgment of this Court above referred to, prays a writ of error herefrom to the Supreme Court of the United States, and an
251 order fixing the amount of the bond, with supersedeas.

It tenders herewith its assignment of errors.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys for Aluminum Company of America.

STATE OF ARKANSAS,
Supreme Court:

Let the writ of error issue upon the execution of a bond in the sum of Fifteen Thousand Dollars, conditioned as prescribed by Section 1000 of the Revised Statutes of the United States; the execution of said bond to operate as a supersedeas of the judgment herein.

This the 26th day of March, 1909.

E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas and Presiding Judge of said Court Now and at the Time the Proceedings in said Case Were Had Herein.

Filed March 26, 1909.

P. D. ENGLISH, *Clerk.*

252 *Bond on Writ of Error.*

ALUMINUM COMPANY OF AMERICA
vs.
GEORGE H. RAMSEY.

Bond on Writ of Error.

Know all men by these presents, That we, Aluminum Company of America, as principal, and American Surety Company of New York, as sureties, are held and firmly bound unto George H. Ramsey, the defendant in error, in the sum of Fifteen Thousand Dollars, to be paid to the said obligees, *their* successors, representatives, and assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 3rd day of April, A. D. 1909.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Arkansas.

Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute *his* said writ of error to effect, and answer all costs and damages if *he* shall fail to make good *his* plea, then this obligation shall be void; otherwise to remain in full force and effect.

[SEAL.] ALUMINUM COMPANY OF AMERICA.
R. E. WITHERS, *Treasurer.*
AMERICAN SURETY COMPANY OF NEW YORK,
[SEAL.] By W. B. SMITH, *Resident Vice-President.*

Attest:

H. P. EDMONSON,
Resident Ass't Secretary.

Filed May 5, 1909.

P. D. ENGLISH, *Clerk.*

253 STATE OF PENNSYLVANIA,
County of Westmoreland:

On this third day of April, personally appeared before me, R. E. Withers, to me well known as the Treasurer of the Aluminum Company of America, and duly authorized by that Company to execute this bond, and who executed the foregoing bond, and acknowledged the same as his free act and deed.

[SEAL.] E. D. CREE,
Notary Public.

My Commission expires January 21st, 1911.

I hereby approve the foregoing bond and sureties, this 26th day of April, 1909.

E. A. McCULLOCH,
Chief Justice of Supreme Court of State of Arkansas and Its Presiding Judge.

Filed May 5, 1909.

P. D. ENGLISH, *Clerk.*

254 *Original Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the —, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Arkansas before you, or some of you, between the Aluminum Company of America, appellant, and George H. Ramsey, appellee, wherein was drawn in question the validity of the act of the legislature of the State of Arkansas, approved March 8, 1907, entitled "An act to give right of action against an employer for injuries or death resulting to his agents, employees or servants, either from the employer's negligence or from the negligence of some of his other employés, servants or agents, and to repeal all acts and parts of acts in conflict therewith," on the ground of it being repugnant to the Constitution of the United States, and the decision of that court was in favor of its validity a manifest error hath happened to the great damage of the said Aluminum Company of America as by its complaint appears. We being willing that error if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of April, in the year of our Lord One Thousand Nine Hundred and nine.

[The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A.]

W. P. FEILD,
Clerk of the Circuit Court of the United States for the Eastern District of Arkansas, Western Division.

Allowed by
E. A. McCULLOCH,
As Chief Justice and Presiding Judge of the Supreme Court of Arkansas.

[Endorsed:] Filed April 28, 1909. P. D. English, clerk, by W. P. Sadler, D. C.

255 *Statement Showing Lodgment.*

STATE OF ARKANSAS,
In the Supreme Court:

I, P. D. English, Clerk of the said Court, do hereby certify that there was lodged with me as such clerk on April 26, 1909, in the matter of the Aluminum Company of America, a corporation, versus George H. Ramsey.

1. The original bond of which a copy is herein set forth.
2. Copy of the writ of error, as herein set forth, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this May 5th, 1909.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court of Arkansas.

256 *Original Citation, &c.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Arkansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Arkansas, wherein Aluminum Company of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Arkansas, this 26th day of April, 1909.

E. A. McCULLOCH,
Chief Justice and Presiding Judge of Supreme Court of Arkansas.

Attest:

P. D. ENGLISH,
Clerk Supreme Court of Arkansas.

LITTLE ROCK, ARKANSAS, *April* 27, 1909.

I, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

HENRY M. ARMISTEAD,
Attorneys for George H. Ramsey.

Filed May 5, 1909.

P. D. ENGLISH, *Clerk.*

257 *Return on Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Arkansas:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this May 5th, 1909.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court of Arkansas.

Costs.

Transcript to Sup. Ct. U. S., Paid	60.00
Index & Marg. Notes 60 Ind. @ $6.00 Notes 2.00	8.00
4 Cert. & Seals @ 50¢	2.00
8 Filings @ 10¢	.80
	$70.80

Costs in Circuit Court.

Transcript & Fees	256.00
	326.80

Costs in Sup. Court.

Advance costs pd. by App't	11.50	
Printing Briefs	15	
		26.50
		353.30

Attest:

PEYTON D. ENGLISH, *Clerk.*

258 *Clerk's Certificate.*

STATE OF ARKANSAS,
In the Supreme Court:

I, P. D. English, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of George H. Ramsey, plaintiff versus Aluminum Company of America, a corporation, defendant, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this May 5th, 1909.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court of Arkansas.

Endorsed on cover: File No. 21,964. Arkansas Supreme Court. Term No. 228. Aluminum Company of America, plaintiff in error, vs. George H. Ramsey. Filed May 24th, 1909. File No. 21,694.

14

Office Supreme Court, U.
FILED.
FEB 7 1910
JAMES H. McKENNEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1909.

ALUMINUM COMPANY OF AMERICA

.....*Plaintiff in Error*

v. No. [redacted]56

GEORGE H. RAMSEY.....*Defendant in Error*

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

MOTION OF DEFENDANT IN ERROR FOR DISMISSAL OR AFFIRMANCE AND BRIEF THEREON.

HENRY M. ARMISTEAD,

T. M. MEHAFFY,

J. E. WILLIAMS,

Counsel for Defendant in Error.

Democrat Print. & Litho. Co., Little Rock.

IN THE

Supreme Court of the United States

OCTOBER TERM 1909.

ALUMINUM COMPANY OF AMERICA,
.....*Plaintiff in Error*

v. No. 468.

GEORGE H. RAMSEY.....*Defendant in Error*

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

To Messrs. George B. Rose,
Wilson E. Hemingway,
Deadrick H. Cantrell,
J. Fairfax Loughborough,
Counsel for Plaintiff in Error:

Please take notice that on the 28th day of February, 1910, at the opening of the court, or as soon thereafter as counsel can be heard, the motions of which the attached are copies will be submitted to the Supreme Court of the United States for the decision of the court thereon. Annexed hereto is copy of brief of argument to be submitted with said motions in support thereof.

.....
Counsel for Defendant in Error.

We hereby acknowledge service of the foregoing notice with copy of the motion to dismiss, the printed record, the statement and brief thereon, this.....day of February, 1910.

.....
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM 1909.

ALUMINUM COMPANY OF AMERICA

.....*Plaintiff in Error*

v. No. 468.

GEORGE H. RAMSEY.....*Defendant in Error*

MOTION TO DISMISS OR AFFIRM UNDER RULE 6.

Comes now defendant in error herein, by T. M. Mehaffy and Henry M. Armistead, his counsel in that behalf:

I.

And moves the court to dismiss the appeal in the above entitled cause for want of jurisdiction, because the judgment from which said appeal purports to have been taken, and the judgment upon which the writ of error is sued out, is the judgment of the Supreme Court of one of the United States, towit, the Supreme Court of the State of Arkansas. and no Federal question is involved. No facts exist conferring jurisdiction upon this court;

II.

And the said defendant in error, by counsel, as aforesaid, also moves the court to affirm the said judgment upon which the said writ of error purports to have been sued out, because, although the record in said cause may show that this court has jurisdiction in the premises, yet it is manifest that said cause was removed for delay only;

III.

And said defendant in error, by counsel as aforesaid, also moves the court for the assessment of 10 per cent damages on the amount of said judgment, because the said writ of error is taken for delay only.

Henry M. Norment

Counsel for Defendant in Error.

STATEMENT.

This cause was removed to this court by a writ of error to the Supreme Court of the State of Arkansas. We have filed printed parts of the record necessary to a decision of these motions. The action is one against the master by a servant for personal injuries, and resulted in a judgment for the servant, plaintiff below, defendant in error here. In the trial court, the defendant, plaintiff in error here, requested an instruction as follows:

> "You are instructed that the Act of the Legislature, approved March 8, 1907, known as "The Fellow Servant Law," in providing that it shall apply to all corporations, but shall not apply to individuals, persons, or partnerships, except those engaged in the operation of a railroad or coal mine, denies to this defendant the equal protection of the law and is a violation of the Fourteenth Amendment to the Constitution of the United States" (see printed record, p. 5).

The request for this instruction was refused. This was the only point in the trial at which a Federal question was raised. The defendant below renewed the argument upon this refused instruction in the Supreme Court of Arkansas. The assignment of errors to this court is as follows:

> "And now comes the Aluminum Company of America, plaintiff in error, and says that in the record aforesaid there is manifest error, and it hereby states that the errors therein which it intends to rely on at the hearing are as follows, towit:
>
> (1) The Supreme Court of Arkansas erred in holding and deciding that the Act of the Legislature of the State of Arkansas, approved March 8, 1907, and entitled, 'An Act to give right of action against an

employer for injuries or death resulting to his agents, employees or servants, either from the employer's negligence or from the negligence of some of his other employees, servants or agents, and to repeal all acts and parts of acts in conflict herewith,' was not repugnant to the Fourteenth Amendment to the Constitution of the United States and that the judgment of the Saline Circuit Court in this cause did not deny plaintiff in error equal protection of the law.

(2) The Supreme Court of Arkansas erred in holding and deciding that the Act of the Legislature of the State of Arkansas, approved March 8, 1907, and entitled 'An Act to give right of action against an employer for injuries or death resulting to his agents, employees or servants, either from the employer's negligence, or from the negligence of some of his other employees, servants or agents, and to repeal all acts and parts of acts in conflict herewith,' was not repugnant to the Fourteenth Amendment to the Constitution of the United States, and that the judgment of the Saline Circuit Court in this cause did not deprive plaintiff in error of its property without due process of law, in violation of said amendment" (see printed record, p 7).

The statute of Arkansas, which plaintiff assails, is as follows:

"Act 69. AN ACT to give right of action against an employer for injuries or death resulting to his agents, employees or servants, either from the employer's negligence or from the negligence of some of his other employees, servants or agents, and to repeal all acts and parts of acts in conflict herewith.

Be it Enacted by the General Assembly of the State of Arkansas:

Section 1. That hereafter all railroad companies operating within this State, whether incorporated or not, and all corporations of every kind and character,

and every company whether incorporated or not, engaged in the mining of coal, who may employ agents, servants or employees, such agents, servants or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee or servant, resulting from the careless omission of duty or negligence of such employer, or which may result from the carelessness, omission of duty or negligence of any other agent, servant or employee of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer." Acts of Arkansas, 1907, page 162.

The Supreme Court of Arkansas construed the statute as one amending the charters of corporations under power reserved to the State in the Constitution of Arkansas of 1874, to "alter, amend or repeal" corporate charters. The court had, previous to the opinion in this cause, construed the statute in the case of *Ozan Lumber Co. v. Biddle*, 87 Ark. 587. In order that the court may be fully advised of the opinion of the Supreme Court of Arkansas in the case at bar, we publish it in full, as follows:

"Aluminum Company of North America v. Ramsey.

Opinion delivered March 1, 1909.

Appeal from Saline Circuit Court; W. H. Evans, Judge; affirmed on remittitur.

STATEMENT BY THE COURT.

George H. Ramsey brought this action against the Aluminum Company of North America to recover damages for physical injuries alleged to have been received by him while in the employment of said company, on account of the negligence of one of his fellow servants.

The defendant company answered, setting up contributory negligence on the part of the plaintiff as a defense to the action.

The Aluminum Company of North America is engaged in the mining of bauxite in Saline County, Arkansas, and in connection with its plant operates a narrow-gauge railroad with a trackage of two miles, which is used for the purpose of hauling the ore from the mines to the drying shed. The equipment of the road consisted of one locomotive and about eighty tram cars. The roadbed was new, and the track in good shape at the time the accident in question happened. At the time of the trial, in September, 1907, George H. Ramsey, the plaintiff, was nearly twenty-three years old. He commenced working for the company on the 31st day of August, 1906. He commenced to run the engine on the 22d day of January, 1907, and continued to run it up to the time he was injured, which occurred on the 18th day of June, 1907. The shed runs north and south. One track runs east and one northeast. The cars from the northeast track were placed in the shed by backing them there. From the east track they were run in by means of a "flying switch." There was no "Y" or turntable. When the cars came from the Martin mine, they were run in the shed by means of the flying switch, and were unloaded there. The customary manner in making the flying switch is described as follows: The locomotive was in front of the cars, coming from the mines, and when it arrived at a big cut about 200 yards from the switch, the engineer would blow the whistle. In response to this signal, two employees of the company would come out of the car sheds, go down along the track and jump on the moving cars to assist in bringing them in. One of them would jump on the engine to pull the pin for the flying switch when the engineer gave the signal. The switch was always left open, so that the engine could take the righthand track, which led around to the end of the shed. After the engine passed the switch, the switch would be thrown so that the cars would take the lefthand track, which led into the shed to the ore bins. When in about fifty yards of the switch, the en-

gineer would check the speed of the engine, and this would cause the coupling between the engine and the car next to it to slacken so that the pin could be pulled. The engineer would then increase the speed of the engine, so that it could pass the switch and get on the righthand track ahead of the cars. When the engine reached the switch, the man on the engine with the engineer would jump off the engine and throw the switch in order to place the cars on the lefthand track leading to the sheds. The switchman would then jump on the moving cars to assist the brakeman in setting the brakes, so as to stop them at the ore bins. The engine was a small one, and had no tender. The train crew consisted of the engineer and a brakeman. Sometimes the brakeman pulled the pin to make the flying switch but he usually rode on the rear end of the train of cars, so that if the train broke he would be in a better position to control the cars which had broken loose from the engine.

The accident happened on the second trip that had been made on the morning of its occurrence. The brakeman was riding on the rear end of the train, and the signal for the switchman to come to throw the switch was blown in the cut as usual. When the engine arrived at a point about fifty yards from the switch, the engineer pulled the pin to uncople the cars from the locomotive. When the plaintiff got back on his feet after pulling the pin, and looked ahead, McLaughlin was walking up the track toward the engine about ten steps away, and Page was standing at the switch with his foot on the sill. McLaughlin and Page had come out of the shed for the purpose of throwing the switch and assisting the brakeman in stopping the cars at the ore bins in the shed. It was the duty of Page to throw the switch. The engine was about forty yards ahead of the cars when it passed the switch. As it passed McLaughlin and Page, the plaintiff said: "You come out here next time and pull this pin. We are in a hurry this morning. I don't want to pull the pin another time. I pulled it last time." They said: "All right." Plaintiff rolled the engine down to the road crossing and stepped off right behind it when it

stopped. He grabbed the clinker hook and turned around. The cars were then within ten steps of the switch. Page was standing at the switch, but plaintiff did not notice whether the switch had been thrown or not. He was in a hurry, and had stepped down to attend to the fire in his engine. Just as he raised up, the cars ran into him, knocked him down and up against the engine. The cars were moving at a speed of seven or eight miles per hour. When the cars hit him, McLaughlin was four car lengths from the first car and Page was behind him at the switch. Plaintiff was both engineer and fireman. It was necessary for him to rake the fire and get out the clinkers to get up steam enough to move the engine back up the grade. He said that he could not do the work in any other position than that assumed by him at the time of the injury; that the work could not be done from the boiler because the platform from behind the end of it was only two feet wide, and the fire would burn him if he stood too close; and that, besides this, in standing on the platform he could not get the clinker hook down in the fire. That he could not do this work from either side of the engine because there was no opening into the fire box on either side, and that in consequence thereof he had to stand right in front of the door and in the middle of the track to do the work. The plaintiff gave the signal for the men to come out to throw the switch when he was about 200 yards from it, and it was his duty to direct when the flying switch was to be made. When he gave the signal, it was the duty of one of the men to pull the pin, and after the engine had passed the switch it was the duty of the other to throw the switch. Plaintiff relied on Page to throw the switch. Plaintiff's leg was crushed so badly it had to be amputated.

The above is the substance of the testimony of the plaintiff in detailing the circumstances relating to the injury.

On cross examination he stated that sometimes in making a flying switch you split the switch. That sometimes it happens that a piece of coal or wood will

get into the switch and prevent its being thrown. That if he had looked a few seconds longer he could have seen whether the cars took the lefthand track, but that he could almost have the engine hot in that time, and that he was in a hurry.

On re-direct examination he testified that the track on which he was injured was so curved that he could not tell, from where he was, whether the switch was open or shut. That the switch bar was small and flat on one side or the other as the switch is open or shut. That at the time of the injury he was absorbed in getting the engine ready to go back to the mine. That if there was a piece of coal in the switch the man at the switch could have told it better than he, and if the switch failed to work he could have notified him of the fact by hallooing to him, as he was only five or six car lengths away.

R. L. Page, for the defendant, testified:

"I am twenty-three years old, and reside at Bauxite, Arkansas, and work for the defendant. I have been at work for that company about one year. I was working for it when Ramsey was hurt. We always made a drop of the cars, or flying switch when bringing ore from the Martin mine. The engine would pull the cars down, and then we would meet them. One of us was supposed to get on the cars and cut the engine off and ride the engine to the switch, the engine taking the righthand track, drop off and turn the switch for the main line, so that the cars would run on into shed. Always two of us went out to meet the train. When it whistled on this occasion, Sam McLaughlin and I went out. I ran past the switch stand, and as the engine ran past me Ramsey said, 'Bob, I want you to be here next time to pull this pin.' I said, 'All right, Houston, I will.' That was about twenty yards from the switch stand. I ran east and caught the cars, getting on the fourth car, and McLaughlin caught on about four cars back of me. I was about twenty yards from the switch when the engine passed me, and proceeded to run east until I climbed on the cars. I was on

the lefthand side of the track, the side the switch is on. I did not stop after leaving the switch. Mr. Pipkin, the shed foreman, sent us out, and we ran until we met the train. McLaughlin and I did not stop and sit on the coal box. There was no one at the switch to throw the switch after the engine passed. I could not have run ahead of the cars to throw the switch, and the cars ran into the siding. McLaughlin was on the opposite side of the track. Forrest Raper, the brakeman, was on the last car. I have never known of Ramsey pulling the pin himself on any other run. Before that it had been the custom for the engineer to stop and wait for us if we did not come out in time to pull the pin and throw the switch. The engine ran about twenty steps beyond the switch before it stopped, stopping on the road crossing. The engine when it passed me was running too fast for me to get on without running a risk of getting hurt."

Other evidence was adduced tending to corroborate the testimony of Page.

There was a jury trial, and the verdict for the plaintiff in the sum of $20,320. The defendant has duly proceuted an appeal to this court.

Appellee asked the court to instruct the jury as follows:

"1. You are instructed that while an employee assumes all the risks and hazards usually incident to the employment he undertakes, he does not assume the risk of negligence of the company for whom he was working or any of its servants. In other words, he has the right to assume not only that the master will perform its duty, but he has a right to assume that each of the other servants will perform their duty, and if, while in the exercise of ordinary care, he is injured, either by the negligence of the master for whom he works or by the negligence of any other servant of the master, he has a right to recover; and if you find from the evidence in this case that the plaintiff, Ramsey,

while in the exercise of ordinary care, relied upon the other servants performing their duties, and was injured by the negligence of some other servant, your verdict must be for the plaintiff.

"2. You are instructed that negligence is the doing something that a man of ordinary prudence would not do under the circumstances, or the failure to do something which a man of ordinary prudence under the circumstances would do; and if you find from the evidence in this case that Ramsey was doing what a man of ordinary prudence would have done under the circumstances, he is not guilty of contributory negligence, and your verdict must be for the plaintiff.

"3. You are instructed that contributory negligence cannot be presumed, but must be proved, and the burden of proving it is on the defendant.

"4. If you find for the plaintiff, in assessing his damages you may take into consideration his pain and suffering, both mental and physical, caused by the injury, if any is proved, his probable future suffering as a result of the injury, if any future suffering appears from the evidence to probably result from the injury, and his expenses for medical attendance caused by the injury, if any can be proved.

"5. If you find that the plaintiff, while in the exercise of ordinary care upon his part, was injured by reason of the carelessness or omission of duty of the defendant, its servants or employees, you will find for the plaintiff."

These instructions were given over the objections of appellant.

At the request of the appellant, the court gave the following instructions:

"2. You are instructed that the mere fact that plaintiff was injured while in defendant's employ, or

was injured about the works of defendant, creates no liability upon defendant to pay for any damages he may have suffered; nor is there any presumption that because of such injury defendant or any of its agents or servants was negligent and is responsible therefor, but the burden of proof is on the plaintiff to establish by a preponderance of the evidence that his injury and damage were caused by the negligence of the defendant.

"3. You are instructed that contributory negligence is the failure to use that degree of ordinary care and caution to avert injury to himself which would be used by an ordinary prudent person under the circumstances; and if you find from the evidence that plaintiff failed in any respect to use that degree of care and caution which an ordinary person would use under the circumstances, and that his failure to use such care contributed to cause his injury, so that, but for his concurring negligence, the injury would not have happened, your verdict will be for the defendant; and by ordinary care is meant the exercise of reasonable diligence, and implies such watchfulness, caution and foresight as under all circumstances of the particular service would be exercised by ordinary careful and prudent persons.

"5. Even though defendant's agents or employees may have been guilty of negligence which caused plaintiff's injury, still if plaintiff was guilty of any carelessness or negligence which contributed in any degree to cause his injury, so that, but for his concurring negligence, the accident would not have happened, your verdict will be for the defendant.

"6. You are instructed that the operation of trains and working on and about tramroad tracks are necessarily dangerous; and a person working about moving trains and about tracks where trains are being moved is bound to use care and watchfulness commensurate with his dangerous surroundings to avoid injury to himself.

"11. If you find from the evidence that, immemediately preceding the time of the occurrence of the

accident complained of in this suit, plaintiff was in charge of defendant's engine and a string of tram cars, and that, as he approached the switch leading to the shed of the defendant's mill, it was his custom to blow his engine whistle, and thereupon switchmen were sent from defendant's mill to meet the engine and train for the purpose of switching the cars into the mill and of controlling their speed with brakes, and that it was the custom for one of these switchmen to get upon the engine and pull the coupling pin connecting the engine with the first car, and thereupon the engine would increase its speed and run ahead of the cars which were coming behind it, the switchman who pulled the coupling pin remained on the engine and getting off at the switch for the purpose of turning it so the cars could take the siding; and if you find from the evidence that at the time this injury occurred the switchman did not reach his engine in time to make the switch as described, and thereupon he uncoupled the engine from the train of tramcars himself and increased the speed of his engine and ran ahead of the cards, and did not use care to ascertain whether the switchman, whose duty it was to turn the switch, was at the switch, but proceeded and after passing the switch got on the track behind his engine, and if he had looked when passing the switch he would have seen that no one was there to turn it, you are instructed that his injury is due to his own fault and neglect, and your verdict will be for the defendant.

"12. You are instructed that there is no evidence in this case that the engine, cars, brakes, switch, or track of the defendant company was out of repair; and there is no evidence in this case of any negligence on the part of defendant, or its agents or employees in this respect.

"16. If you find from the evidence that it was not plaintiff's duty to uncouple the engine from the cars, and that his doing so made the drop switch more dangerous, and contributed in any degree to cause his injury, so that but for his contributory negligence the accident would not have happened, then his act was

contributory negligence, and your verdict will be for the defendant.

"17. If you find from the evidence that it was plaintiff's custom and duty, when making trips from the Martin mine to stop his train and wait until the switchmen came from the mill to assist in switching the cars, and that he failed to stop his train and wait for the switchmen to come from the mill to assist in switching the cars, and that he failed to stop his train and wait for the switchmen to arrive at the train to assist in making the switch that was attempted before his injury, and that his conduct in this respect contributed in any degree to cause his injury, so that, without his concurring negligence the accident would not have happened, your verdict will be for the defendant.

"37. The testimony of Bullock of any statement made by Page that Page was at fault for the accident, or was at the switch in time to turn it, is not admissible as tending to prove that Page was at the switch in time to have turned it and have prevented the accident, but is only admissible as it may affect the credibility of Page."

These instructions were given by the court. Other instructions were asked by the appellant, which were refused. As they will be sufficiently set out in our opinion, it will not be necessary to do so here.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. The making of flying switches is dangerous work, and in making them an extra degree of care is required. Labatt on Master and Servant, Sec. 338. Appellee was not inexperienced, but, on the contrary, acquainted with the work and its dangerous nature. His being in a hurry was no excuse for neglect on his part to exercise the degree of care for his own safety the nature of the work demanded. By his own testimony he was negligent, first, in getting on the track at all after making the flying switch, until his senses ap-

prised him that the cars had taken the other track; second, in failing to know the man under his direction would do the work as he desired it done; and, third, in getting on the track after making the flying switch under any circumstances to do something that was unnecessary to be done at the particular moment. 61 Ark. 549; 56 Ark. 273; 66 Ark. 237; 76 Ark. 13; 49 N. W. 848; 37 N. Y. Supp. 144; 159 Mass. 536; 69 Ia. 154; 96 Cal. 269; 90 Va. 405; 83 Va. 512; 102 Ia. 507; 98 Ia. 544; 40 N. E. 439; 103 Ala. 142; 139 Ind. 682; 181 Mass. 197; 111 Fed. 769; 106 Ia. 253. Appellee controlled the movement of the train and how the work should be done at the time. He ought not to recover for an injury resulting from his own want of care. Labatt on Master and Servant, Sec. 333; 128 Mass. 1; 89 Ala. 24; 64 Ill. App. 359; 45 Ark. 325; 53 Fed. 61; 86 Ark. 65.

2. The failure of plaintiff to keep a lookout on the moving cars charged him with negligence *per se*. Acts 1901, p. 213; 85 Ark. 237; 78 Ark. 22; 80 Ark. 528; 83 Ark. 61; Labatt on Master and Servant, Sec. 362; 39 W. Va. 46.

3. That appellee unnecessarily exposed himself to the danger that resulted in his injury was one theory of appellant's defense. Hence it was error to refuse specific instructions on this point. 50 Ark. 545; 69 Ark. 134; 80 Ark. 345; 87 Ark. 531; 9 N. M. 49; 180 N. Y. 682.

4. It is patent that appellee would have been freer from danger on his engine than he would with part of his body on the ground, and it is elementary that if there is a safe way and a dangerous way to do the work, and an employee adopts the dangerous way, he is guilty of negligence. Thompson on Neg., Sec. 5372; 93 Ga. 570; 56 Fed. 973; 108 Fed. 747; 103 Ga. 820; 112 Ga. 914; 24 Fed. 908; 12 Ill. App. 372; 6 Tex. Civ. App. 650; 78 Ill. App. 278; 106 Ia. 253; 179 U. S. 698.

5. There was evidence tending to show that on previous occasions when appellee was in charge of the

train the cars had followed the engine in making a flying switch, and had not taken the switch, and the jury should have been instructed that if appellee knew this he should have exercised greater care in these contingencies. 98 Mich. 343; 159 Mass. 532; 170 Mass. 164; 114 Ala. 131; 52 N. Y. Supp. 30.

6. If it was appellee's duty to instruct the employee under him what to do under the circumstances, and he failed to do so, and such failure to instruct contributed to cause the injury, then the appellee was guilty of negligence contributing to his injury. 22 Ky. Law Rep. 1400; 85 Ill. 481; 97 Ga. 777; 129 Ala. 553.

7. The verdict is excessive. 76 Ark. 184; 57 Ark. 377; 48 S. W. 222; 99 S. W. 74; 24 N. Y. Supp. 490; 10 N. Y. App. Div. 463; 29 N. Y. Supp. 816; 87 N. W. 505; 66 S. W. 246; 31 So. 994; 32 So. 535; 70 Ark. 331; 80 S. W. 768; 182 Mo. 687; 103 N. W. 42; 189 Mo. 408; 84 Pac. 1127.

8. The language of the act (Acts 1907, p. 163) gives a right of action only in instances where the agents, servants or employees are in the exercise of due care. Before a party can recover under the act, he must show that he is within its terms, and the burden is on him to show that he was in the exercise of due care. 78 Ia. 509; 55 Ia. 326; 154 Mass. 31; 58 S. C. 413; 59 Ga. 436; 51 N. W. 125.

The act is unconstitutional in that it discriminates in favor of partnerships and individuals as against corporations, and the court's former holding, 87 Ark. 587, that the act was intended as an amendment to the charter of incorporation is not evidenced by its title or language. 204 U. S. 103.

Mehaffy, Williams & Armistead, for appellee.

1. Cases cited by appellant in support of its contention that plaintiff was guilty of contributory negligence as a matter of law, that he had no right to rely upon another servant doing that which he was there to do, and that he was guilty of contributory negligence

in cleaning the engine from the ground, are either not in point, or based upon facts that make them inapplicable to this case; others support appellee's contention. 159 Mass. 532; Labatt, Master and Servant, Sec. 356, p. 925. See 58 Ia. 150; 64 Ia. 603.

2. The constitutionality of the act abolishing the fellow servant defense has been settled in this State. Ozan Lumber Co. v. Biddle, 87 Ark. 587. Such legislation is also sustained by the United States Supreme Court. 127 U. S. 205; 127 U. S. 211; 157 U. S. 210; 175 U. S. 350; 199 U. S. 590.

3. It was not negligence as a matter of law for appellee to get down off his engine to fix the fire. To so hold would be to make the servant an insurer of his own safety. 87 Ark. 443.

4. The fifteenth instruction requested by appellant is not applicable to the facts of this case. Appellee was not going on the track where other cars were likely to be moved, but where, if other employees performed their duty, they would not come. 84 Ark. 377.

5. Instructions were properly refused which assumed that appellee had exclusive charge of the train and cars, engine and track and control over the men working with him. These other parties had been sent to perform, and had performed, the duties of handling the switch and operating the cars into the mill before, and the assumption that appellee should have told them to throw the switch or should have left his engine and directed the throwing of the switch in person is not sustained by either the law or the facts. Labatt, Master and Servant, Sec. 888. Appellee and these other employees were fellow servants. 77 Ark. 290; Thompson on Neg., Sec. 5050; 14 Am. & Eng. Ry. Cas. (N. S.) 625; 81 Ind. 226; 26 Ill. App. 99; 35 La. Ann. 1166; 123 Mo. 121; 33 Fed. 801. See also 14 Am. & Eng. R. Cas. (N. S.) 575; 82 Ark. 334; 51 Ark. 467; 46 Ark. 555; 42 Ark. 417; 67 Ark. 377.

6. The "lookout statute" (Kirby's Digest, Sec. 6607) applies to Raper, McLaughlin and Page, who

were in charge of the running cars, and it was their duty to keep a lookout for persons on the track and stop the cars or give warning of their approach to appellee, who was not a trespasser, but rightfully upon the track in appellant's service. 77 Ark. 1; 80 Ark. 528; 81 Ark. 275.

7. The burden of proving contributory negligence was on appellant, notwithstanding the qualifying phrase in the Fellow Servant Act, "being in the exercise of due care." 48 Ark. 333; 58 Ark. 125; 72 Ark. 572; Labatt, Master and Servant, 2329, note b; 51 N. W. 125; 54 Ga. 509; 40 Fla. 17; 58 Ga. 485; 95 Ga. 685; 85 Wis. 610; 120 Wis. 412.

8. The verdict is not excessive. 14 N. Y. Supp. 336; 46 Minn. 439; 65 N. Y. Supp. 1064; 84 S. W. 375; 33 Ill. App. 450; 50 S. W. 624.

HART, J. (after stating the facts). 1. It is earnestly insisted by counsel for appellant that the first instruction asked by him, which was peremptory, should have been given. On this view of the case, we must consider the testimony in its most favorable aspect to the appellee, for it is the province of the jury to pass upon the weight of the evidence. With that we have no concern, however greatly we may think it preponderates one way or the other. The test is, could reasonable and fair-minded men from all the facts and circumstances adduced in evidence have come to different conclusions as to whether or not negligence on the part of appellee might be inferred? If so, the right to draw the inference is for the jury. On the other hand, if reasonable minds could have reached but one conclusion from the evidence, then the question of contributory negligence is one of law for the court.

Appellee, when he was injured, was not a trespasser upon the track. His work required him to be there. He testified that the engine was so constructed that it was necessary for him to stand in the middle of the track to rake out the clinkers. His work required

haste, for the rapidity with which he hauled the cars to and from the mines necessarily facilitated the operation of the mines. It is true that if he had waited a few seconds he could have seen that the switch was not thrown. But he said that the switchman was standing there with his foot on the sill of the switchstand, and that it was his duty to throw the switch. He further stated that, at the time of the injury, he was only five or six car lengths away from the switchstand, and could have heard a warning cried by the switchman if the switch had failed to operate. Under the circumstances, we do not think he was necessarily negligent because he did not wait to see if the switch was thrown and the cars took the lefthand track before he commenced to fix his fire.

As was said in the case of Rahman v. Minn. & N. W. Rd., 43 Minn. 42, "The law imposed upon him the exercise of ordinary care and prudence, and in considering what this is, under a given state of facts, regard must be had for the danger to be apprehended, the reasonable probability of incurring it, as well as the natural presumption that other persons will discharge their duty and act with due care." See also Henry v. Sioux City, etc., Ry. Co., 9 Am. St. Rep. 457. This is not a case where the physical facts were such that reasonable minds must come to the conclusion that appellee heedlessly took a position of danger. Certainly, he would have been in no danger if the switchman had thrown the switch, as his duty required him to do, or, even if it failed to operate, had the switchman called out to him that fact, he could have escaped injury. Hence we think from all the facts and circumstances of the case as they appear from the record that the question of contributory negligence was one for the jury, and that the court was right in not directing a verdict for the appellant.

2. Instructions numbered 26 to 36, inclusive, pass out of the case.

The act of our Legislature, approved March 8, 1907, which abolishes in this State the common-law

rule that a servant assumes the risk of negligence of his fellow servant, has been sustained by the court in the case of Ozan Lumber Co. v. Biddle, 87 Ark. 587, decided since the trial of this case in the court below. Hence it is not necessary to notice the refusal to give these instructions which were asked by the appellant, and which were based upon the unconstitutionality of that act, except to say that the opinion in the case of Ozan Lumber Co. v. Biddle is in accord with the modern text writers on the subject, and as well the great majority of adjudicated cases.

3. The first assignment of error is based upon the action of the court in giving instruction No. 1 at the request of appellee. The instruction is set out in the statement of the case. It is claimed that the language of the instruction was susceptible of the construction that appellee had an absolute right to assume that his fellow servants would do their duty, and that it was therefore misleading and prejudicial.

It may be well here to notice the principles of law upon which this instruction is based. The common-law doctrine was that a servant assumed the negligence of his fellow servants. In discussing the question of contributory negligence under such conditions, Mr. Elliott says:

"An employee may, within limits, act upon the assumption that the employer's duty to exercise ordinary care has been performed, but the fact that the employee may act upon such assumption does not relieve him from the duty of exercising ordinary care to avoid the injury. The presumption that the duties of the employer to the employee have been performed does not authorize the employee to carelessly or heedlessly venture into danger, nor does it relieve him from the duty of taking knowledge of and guarding against dangers plainly and fully open to observation." 3 Elliott on Railroads, p. 768.

Again, the right of the servant to rely on the care of the master is thus stated: "Unless the danger is

actually known to the servant, or is so obvious and imminent that an ordinarily prudent person would refuse to incur it, he had the right to rely upon the performance by the master or his authorized agents, other than his own fellow servants, of the duties imposed upon the master by law for the protection of his servants." 26 Cyc. 1233.

The Act of March 8, 1907, of the General Assembly of the State of Arkansas (Acts of 1907, p. 162) abrogated the common-law rule that a servant assumes the risk of negligence of his fellow servant. It is very broad in its terms, and in effect provides that in cases of corporations the master shall be liable to the servant for injuries or death caused by the negligence of any other servant of the master in the same manner and to the same extent as if the negligence causing the injury or death was that of the employer. This rule as to the right of the servant to rely on the exercise of due care by his fellow servant under statutes similar to our fellow servant statute is aptly stated as follows:

"While under statutes limiting the fellow servant doctrine a servant has the right to rely upon the exercise of reasonable care by his fellow servants, this does not absolve him from caring for his own safety, as an ordinary prudent man would do under like circumstances, and he cannot recover for an injury received by reason of the negligence of a fellow servant, if he knew, or by the exercise of ordinary care might have known thereof." 26 Cyc. 1236 and cases cited. An examination of the cases cited shows that they support the rule as stated. Tested by these principles, we think the instruction was correct. We do not think it is open to construction that it told the jury that the appellee had an absolute right to assume that his fellow servant would perform his duty, regardless of the fact of whether appellee was himself under all the circumstances of the case in the exercisee of ordinary care and prudence. We think the effect of the instruction was to tell the jury that the law imposed upon appellee the exercise of ordinary care and prudence, and in determining that question that the jury might consider the

fact that he relied upon his fellow servant performing his duty, at the same time having due regard himself for the danger to be apprehended and the reasonable probability of incurring it.

We do not wish to be understood as approving the instruction in the form in which it was given; but if the language was thought to be ambiguous or of doubtful meaning, counsel for appellant should have specifically called the court's attention to that fact and asked that the instruction be amended instead of making a general objection to it. St. Louis, I. M. & S. Ry. Co. v. Hoshall, 82 Ark. 391, and many cases cited; St. Louis, I. M. & S. Ry. Co. v. Hardie, 87 Ark. 475. A general objection is insufficient to point out an ambiguity in an instruction. Burnett v. State, 80 Ark. 225, and cases cited.

4. Counsel for appellant insists that the court erred in not giving instructions Nos. 8 and 13. As these instructions are open to the same objection, they may be considered together. They read as follows:

"8. If you find from the evidence that the fire in the engine which plaintiff was operating could have been attended to by plaintiff by remaining on the engine, but that, instead of remaining on the engine to attend to the fire, he got off the engine and stood behind it upon the track, and thereby was injured you are instructed that plaintiff placed himself in a dangerous position needlessly, and was guilty of contributory negligence, and your verdict will be for defendant.

"13. If you find from the evidence that in order to make the flying switch, such as was customary at defendant's plant and as described in evidence, the time in which the person throwing the switch had to perform this duty was short, and the person throwing the switch had to act with promptness in order to have the switch thrown in time for the cars to take the track to the shed, and that the plaintiff knew of this fact, but, not-

withstanding such knowledge, he assumed that the switch would be turned in time for the cars to take the other track, and did not look or make other reasonable effort to ascertain that the switch had not been turned, but got upon the track in front of the moving cars, and was injured, you are instructed that he had no right to place himself in that position of danger in absolute reliance upon the switch being turned in time to divert the cars, although when he passed the switch with his engine he may have seen some person at the switch who apparently expected to turn it; and if he acted in this manner he was guilty of contributory negligence, and your verdict will be for the defendant."

It will be noted that the instructions single out certain facts, and tell the jury that if they find these facts to exist appellee was guilty of contributory negligence. The effect of the instructions was to tell the jury if they found the facts stated in them to exist that appellee as a matter of law was guilty of contributory negligence.

"The existence of negligence should be passed upon by the jury as any other fact, and it is improper to instruct them that a certain group of facts amounts to negligence *per se*, unless such acts are declared by law to be negligence *per se*, or are such as to induce an inference of negligence in all reasonable minds." 29 Cyc. 645, and cases cited; Pauckner v. Wakem (Ill.), 14 L. R. A. (N. S.) 1118; Louisiana & T. Lumber Co. v. Brown, 109 S. W. (Tex.) 950.

The instructions as written are peremptory in their nature and took away from the jury the question of contributory negligence. Consequently, they invaded the province of the jury, which is never permissible. Rector v. Robbins, 82 Ark. 424; Stephens v. Oppenheimer, 45 Ark. 402; Reed v. State, 54 Ark. 621; Blankenship v. State, 55 Ark. 244.

5. Instructions Nos. 7, 9, 10, 14, 22, asked by appellant and refused by the court, are open to precisely the same objections as are instructions Nos. 8

and 13, already discussed. What has been said in condemnation of them applies with equal force to the ones here under consideration. No useful purpose can be served by setting them out in the opinion, and we need only say that the court was right in refusing them, for the reasons already given.

6. Counsel for appellant insists that the court erred in not giving instruction No. 15 asked by them. It reads as follows:

"15. You are instructed that the tracks on which cars are moving are dangerous, and that it is the duty of persons having occasion to go upon track to make use of their senses to ascertain that no moving trains are near which may do them harm; and it was the duty of plaintiff before getting upon the track to use such care as a prudent person under the circumstances would use to ascertain if any moving cars were on the track on which he was standing that might possibly cause his injury; and if you find that he failed to keep such a lookout as a prudent person under the circumstances would keep on moving cars, and that by reason of such failure he was injured, your verdict will be for the defendant, even though you may find that some of defendant's other employees were also guilty of negligence."

We think this instruction was covered by the other instructions given in this case, particularly by instructions Nos. 3 and 6, given at the request of appellant. A comparison of the instructions will show that the same matters embodied in this instruction are substantially embraced in the instructions given. A refusal to give an instruction that is substantially covered by another instruction given is not prejudicial. Fox v. Spears, 78 Ark. 71; Burrow v. Hot Springs, 85 Ark. 396.

In the case of Sadler v. Sadler, 16 Ark. 628, English, C. J., speaking for the court, said: "A multiplication of instructions, announcing in effect the same legal principle, tends only to encumber the record, perhaps to confuse the jury, and is not to be encouraged."

To the same effect, see Haney v. Caldwell, 43 Ark. 184. This applies with striking appropriateness to cases like the present one, where, although the testimony is voluminous, the issues to be submitted to the jury are not complicated, and thirty-eight instructions were requested by the appellant. We may add in this connection that instructions Nos. 4, 18, 19 and 20 are substantially the same as other instructions given by this court, consequently no prejudice resulted to appellant from the refusal of the court to give them.

7. The counsel for appellant assigns as error the refusal of the court to give instruction No. 23 asked by them. It reads as follows:

"23. If you find from the evidence that, after plaintiff had passed the switch with his engine, and had brought it to a stop, before getting to the ground to fix the fire, he looked back and saw that the cars had not passed the switch, and if he had known that the switch was still turned for the track he was on, he would not have gotten on the track behind his engine where he was hurt, and that the switch and tracks were in his plain view, and he could have seen that the switch was not turned if he had looked at it, or at the tracks at that point, but he failed to look at the switch or track at that point, and thereby did not exercise the reasonable care of an ordinary prudent person under the circumstances, your verdict will be for the defendant."

We think this instruction is open to the objection that the effect of it was to take the question of contributory negligence from the jury. The word "thereby" refers to "but he failed to look at the switch or track at that point," and thus makes appellee's failure to look contributory negligence as a matter of law. In any event, the language used is doubtful or ambiguous, and it is not prejudicial for a trial judge to refuse an instruction which in his opinion has a tendency by its terms to take from the consideration of the jury a disputed question of fact, and thus mislead them as to the issues submitted to them for their decision.

8. Counsel for appellant assigns as error the action of the court in giving instruction No. 3 at the request of the appellee. There was error in giving this instruction. In the case of Little Rock, M. R. & T. Ry. Co. v. Leverett, 48 Ark. 333, the court said: "Contributory negligence is a matter of defense. It is not presumed, but must be proved, and the burden of proving it rests on the defendant." This court has ever since adhered to that rule. Jones v. Malvern Lumber Co., 58 Ark. 125.

In the case of Hot Springs Street Railroad Co. v. Hildreth, 72 Ark. 572, the court said: "The burden of proving negligence is on the plaintiff, and of proving contributory negligence is on the defendant, unless it is shown by the testimony of the plaintiff."

The Act of March 8, 1907, commonly known as the Fellow Servants Act, makes the master liable for the negligence of all his servants, but it does not take away his defense of contributory negligence, and the rule in regard to the burden of proof is not changed by the terms of the act. Hence we can see no reason for a change of the rule, and adhere to our former rulings in that respect.

9. We now come to the question, Was the verdict excessive? This question has given us much concern. It is an extremely difficult and somewhat delicate matter, in cases like this, to tell when the verdict is, or is not excessive. It has been frequently said that it is difficult to find a measure of damages for pain, for the obvious reason that none would be an acceptable inducement to suffer it; but when it has occurred, the compensation as such must be considered upon a reasonable basis of estimate. Under our system of jurisprudence, the amount of damages must be left largely to the reasonable discretion of the jury. Again, we may say, it has been repeatedly held that they may not give any amount they please. The appellee in this case was twenty-two years old at the time of the accident. He had been to school but little, but his testimony shows him to be a man of fair average intelligence. His left

leg was injured, and had to be amputated about five and one-half inches below the hip. He suffered great pain and lay in the hospital for one month after his leg was amputated. On his return home, he fell and hurt it again, so that he had to be carried back to the hospital and remained there for six weeks longer. His medical bill and hospital fees were $386.22. He commenced working for the appellant in August, 1906, and worked for it until the time of the accident. He commenced to run the engine on the 22d of January, 1907, and was earning $2.40 per day when he was hurt. Prior to his employment by appellant he had worked fifteen nights in the railroad yards at Hot Springs running a switch engine. This was all the experience he had in running an engine for pay, prior to his employment by appellant. He said he had learned how to run an engine by riding on railroad locomotives with engineers who were his friends and who would teach him.

Dr. Gann, the surgeon who amputated his leg, said that nearly all stumps give a man more or less pain some time during his life, but not necessarily in every case.

It will be seen that appellee had not followed the occupation of running an engine on a regular line of railroad, and it is a matter of common knowledge that he would have had to serve as a fireman before he could obtain such a position. His means of earning a living in many other occupations is still open to him, and the amount he will recover in this case, properly invested, will yield an income that will materially assist him in providing for his future support. Everything considered, we think the verdict was excessive, and that the amount recovered should be reduced to $12,000.

If appellee will, within fifteen days, remit the amount of damages down to $12,000, the judgment will stand affirmed; otherwise the judgment will be reversed, and the cause remanded for a new trial.

Mr. Justice Battle dissents from the construction we have placed upon instruction No 1 given by the court at the request of appellee, and upon instruction No. 23 asked by appellant and refused by the court.

Mr. Justice Wood dissents upon the whole case."

This opinion is now published in 89 Ark. 522.

We have had printed under the supervision of the clerk of this court so much of the record as contains the pleadings, requests of defendant below for instructions Nos. 26 to 36, inclusive, and the assignment of errors.

POINTS AND AUTHORITIES.

1. This court is without jurisdiction because:

(1) No Federal question is involved in the State court's construction of the statute.

(2) If there is a Federal question it is foreclosed by repeated decisions of this court.

Ozan Lumber Co. v. Biddle, 87 Ark. 587.

Article 12, Section 6, Constitution of Arkansas.

Clark v. San Francisco, 124 U. S. 639.

Hammond Packing Co. v. Arkansas, 212 U. S. 322-345.

Berea College v. Kentucky, 211 U. S. 45-54.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 353.

Missouri Pacific Ry. v. Mackey, 127 U. S. 205.

Minneapolis Ry. v. Herrick, 127 U. S. 211.

Chicago, etc., Ry. v. Pantious, 157 U. S. 210.

Tullis v. Lake Erie, etc., Ry. 175 U. S. 351.

Minnesota Iron Co. v. Kline, 199 U. S. 590.

Wilmington Star Mining Co. v. Fulton, 205 U. S. 74.

El Paso, etc., Ry. v. Guiterrez, U. S. opinion of Nov. 15, 1909.

Leonard v. V. S. & P. Ry. Co., 198 U. S. 416.

Central Land Co. v. Laidley, 159 U. S. 103.

Castello v. McConnico, 168 U. S. 674.

Austin v. Boston, 7 Wallace 694.

2. Even though there be color of jurisdiction, the case should be affirmed as an appeal taken for delay.

City of Chanute v. Trader, 132 U. S. 210.

Richardson v. Louisville & N. Ry. Co., 169 U. S. 128.

Blythe v. Hinckley, 180 U. S. 333.

Equitable Life Assurance Society v. Brown, 187 U. S. 308.

Stephenson Iron Mining Co. v. Kibbe, 205 U. S. 536.

Minnesota Iron Co. v. Kline, 199 U. S. 590.

ARGUMENT.

THIS COURT IS WITHOUT JURISDICTION.

The Supreme Court of Arkansas, in the case of *Ozan Lumber Co. v. Biddle*, 87 Ark. 587, construed the Arkansas Employers Liability Act of 1907, insofar as it fixes a rule of liability for corporations, as a reasonable exercise of the power of the State reserved by Article 12, Sec. 6 of the Constitution of 1874, to alter corporate charters. Such article is as follows:

"Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The General Assembly shall have power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of the State, in such manner, however, that no injustice shall be done the incorporators."

In the case above cited, the court said:

"The amendment to charters of corporations made by the act in question, makes the employer liable in damages for injuries or death sustained by one of its employees through the negligence of a fellow servant. Is this not a reasonable amendment to the charters of corporations? Why should not the employer suffer the consequences resulting from the negligence of his employee, instead of the employee who is injured by such negligence? The employee has no control over his fellow servant, did not employ him; and cannot discharge him. The act does not make him liable for such damages unless the employee is at the time in the exercise of due care. Acts of Legislatures imposing such liability on railroad companies have been upheld by the courts on account of the hazardous character of the business of operating a railway. The only difference in the reason for such acts and the act in question is the danger of the

service of railroads is greater than that of other corporations, a difference in degree and not in kind."

The facts stated, in the court's opinion, in the above case show that the employer was an incorporated company, operating a sawmill, and the employee was injured while working about the saw. In the case at bar, the pleadings (see printed record, pp. 1-4) and the court's statement of facts in the opinion, show that the employer is an incorporated mining company, operating an ore carrying railway, and the employee was injured by a collision of some cars and an engine on said railway.

The Supreme Court of Arkansas, in the case at bar, in considering the claim that the statute is unconstitutional, followed the *Biddle* case, above cited. We contend that this ruling does not involve a Federal question. No claim is made or can be made in this case, that the obligation of a contract is impaired. It does not appear whether the plaintiff in error entered the State of Arkansas as a corporation, or was incorporated, before or after the Act of 1907 was adopted. If it entered after the act was adopted it cannot complain.

"The existence of a contract is part of the Federal question itself."

Clark v. San Francisco, 124 U. S. 639.

This court quite recently considered the power of the State of Arkansas to deal with corporations under the constitutional provision above cited, and said:

"The contention that to apply the law to domestic corporations would, as to such corporations, cause it to be repugnant to the contract clause of the Constitution, is without merit. The chartered right to do a particular business did not operate to deprive the State of its lawful police authority, and therefore, the franchise to do the business was inherently qualified by the duty to execute the charter powers conformably to such reasonable police regulations as might thereafter be adopted in the interest of the public welfare. Besides, it is not disputed that the State, under its Constitution, had a reserve right to repeal, alter and amend charters by it granted, and, therefore, even if the impossible assumption was indulged that the grant of the power to do business implied, in the absence of such reservation, the right to carry on the business in violation of a lawfully regulating statute, the existence of the reserve power leaves no semblance of ground for the proposition. The claim of an irrepealable contract cannot be predicated upon a contract which is repealable. Citizens Bank v. Owensboro, 173 U. S. 636. And no support for the contrary view arises because the Constitution of Arkansas exacted that the authority to repeal, alter and amend should be exercised 'in such manner, however, that no injustice be done to incorporators.' *The determination whether the power to repeal, alter or amend was exerted in such a manner as to be unjust to incorporators was within the province of the State court to finally decide, unless that power was exerted in such an arbitrary manner as, irrespective of the contract clause, to deprive of some other and fundamental right which was within the protection of the Constitution of the United States.*"

Hammond Packing Co. v. Arkansas, 212 U. S. 322, 345.

And, confining this argument to a consideration of very recent cases of this court as authority on this point, we call attention to the following from *Berea College v. Kentucky*, 211 U. S. 45-54:

"Upon this we remark that when a State court decides a case upon two grounds, one Federal and the other non-Federal, this court will not disturb the judgment if the non-Federal ground, fairly construed, sustains the decision. Murdock v. Memphis, 20 Wall. 509; Eustis v. Bolles, 150 U. S. 361; Giles v. Feasley, 193 U. S. 146-160; Allen v. Arguinbau, 198 U. S. 149.

"Again, the decision by a State court of the extent and limitation of the powers conferred by the State upon one of its own corporations is of a purely local nature. In creating a corporation a State may withhold powers which may be exercised by and cannot be denied to an individual. It is under no obligation to treat both alike. In granting corporate powers, the Legislature may deem that the best interests of the State would be subserved by some restriction, and the corporation may not plead that, in spite of the restriction, it has more or greater powers because the citizen has."

We wish to be understood as insisting that there is no Federal question here, because—

"The decision by a State court of the extent and limitation of the powers conferred by the State upon one of its own corporations is of a purly local nature;" and

"The determination whether the power to repeal, alter or amend was exerted in such a manner as to be unjust to incorporators was within the province of the State court to finally decide."

In *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 353, it was said:

"When analyzed, the whole claim is reduced to the assertion that in enforcing a condition which is impliedly a part of the charter, the State, through the regular administration of law by its courts of justice, has by such courts erroneously construed its own laws. This court in such a case has no jurisdiction to review that determination."

We have not forgotten the ever present qualification that the power of the State may not be exerted in such an arbitrary manner as to destroy a fundamental right within the protection of the Constitution of the United States. The claim of deprivation of fundamental right made for plaintiff in error is found in the only reference to the Federal Constitution in the record, in request for instruction No. 27 as follows:

XXVII.

"You are instructed that the Act of the Legislature, approved March 8, 1907, known as 'The Fellow Servant Law,' in providing that it shall apply to all corporations, but shall not apply to individuals, persons, or partnerships, except those engaged in the operations of a railroad or coal mine, denies to this defendant the equal protection of the law, and is in violation of the Fourteenth Amendment to the Constitution of the United States." (See printed record, p. 5.)

This is a frivolous contention made for the purpose of appeal only. If this plaintiff in error was unincorporated it would *yet* be liable under this statute. In the *Hammond* case, cited above, it was said:

"Although it be conceded that the provisions of the statute cannot, consistently with constitutional limitations, be applied to individuals, such concession would not cause the act to amount to denial of the equal protection of the laws. The difference between the extent of the power which the State may exert over the doing of business within the State by an individual and that which it can exercise as to corporations, furnishes a distinction authorizing a classification between the two."

But it is not necessary to make such a concession, that is, that this statute could be unconstitutional as to individ-

uals, and yet be sustained by the State's right to make a class of corporations, because, by repeated decisions of this court, the State's power to classify *risks* is recognized, and it is no longer a question, but a settled fact, that the ***hazard*** of railroad employment may be made the subject of special rules of master's liability. This power is established in the following cases:

Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205.

Minneapolis Ry. v. Herrick, 127 U. S. 211.

Chicago, etc., Ry. v. Pontius, 157 U. S. 210.

Tullis v. Lake Erie, etc., Ry., 175 U. S. 351.

Minnesota Iron Co. v. Kline, 199 U. S. 590.

And on this subject, it was said in a very late case:

"And even though the liability imposed upon the mine owner to respond in damages for the wilful failure of the mine manager and mine examiner to comply with the requirement of the statute was not in harmony with the principles of the common law, applicable to the relation of master and servant, it being competent for the State to change and modify those principles in accord with its conceptions of public policy, we cannot infer that the selection of mine owners as a class upon which to impose the liability in question was purely arbitrary and without reason. And the views just expressed also adequately dispose of the contention that, by the statute, the mine owner was denied the equal protection of the laws."

Wilmington Star Mining Co. v. Fulton, 205 U. S.

In *Employers Liability Cases*, 207 U. S. 504, Mr. Justice White said:

"Although we deem it unnecessary to consider that subject, it must not be implied that we question the correctness of previous decisions noted in the margin (citing above

cases) wherein State statutes were held not to be repugnant to the Fourteenth Amendment, although they classified steam railroads in one class for the purpose of applying a rule of master and servant."

And in the case of *El Paso, etc., Ry. v. Enedina Guiterrez*, decided by this court November 15, 1909, it was held that Congress has "undoubted right" to pass a law so regulating the liability of carriers to their servants in the Territories and District of Columbia.

The Arkansas statute provides a rule of liability for railroad employers, "whether incorporated or not." The plaintiff in error operates a railway and the defendant in error was injured while engaged in operating a train upon such railway. To contend that the question of the justice of such a classification of hazards is now a Federal question is to contend that Federal questions never become settled; that litigants may invoke the Constitution and forever appeal identical questions.

"A Federal question may have become so explicitly foreclosed by prior decisions as to afford no basis for a writ of error."

Leonard v. V. S. & P. R. R. Co., 198 U. S. 416.

Because the Supreme Court of Arkansas based its opinion of the validity of the act on the State's right to "alter amend or repeal" charters, instead of upon the State's right to make a special rule for a special risk will give the plaintiff in error no right to complain.

"If a *valid* act is misconstrued by the court of a State, a writ of error will not lie."

Central Land Co. v. Laidley, 159 U. S. 103.

"The plaintiff in error has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case which *he presents* the effect of applying the statute is to deprive him of his property without due process of law."

Castillo v. McConnico, 168 U. S. 674.

"Where a right claimed under a law is denied by the judgment of the State court, the Supreme Court, upon writ of error to the State court, can only consider the statute in connection with the case before it. It cannot inquire whether in another case arising upon a different state of facts, the statute may not produce results in conflict with the Federal Constitution."

Austin v. Boston, 7 Wallace 694.

II.

THE WRIT OF ERROR IS TAKEN FOR DELAY AND THE CASE SHOULD BE AFFIRMED EVEN THOUGH THE COURT HAS JURISDICTION.

In *City of Chanute v. Trader,* 132 U. S. 210, this court found, upon motions such as these, that it had jurisdiction, but was of the opinion that the appeal was taken for delay, and affirmed, saying:

"In the present case there does not appear to be any ground for contending that this court has no jurisdiction, yet we are entirely satisfied that the reasons assigned for

taking the writ of error are frivolous. * * * This court, in the exercise of its inherent power and duty to administer justice, ought, independently of subdivision 5 of rule 6, to reach the mischief by affirming the action below."

And following this authority, the case of *Richardson v. Louisville & N. R. Co.*, 169 U. S. 128, was affirmed on motion to dismiss, the court saying:

"The ruling was so obviously correct that we do not feel constrained to retain the case for further argument."

And the same course was followed in disposing of *Blythe v. Hinkley*, 180 U. S. 333.

In the case of *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, the rule under which these motions are made was fully considered, and on this point the court said:

"It has also been decided by this court that even where the motion to dismiss is denied, and where such motion should be treated as without color, considering alone the formal making of such question, yet notwithstanding the provisions of subdivision 5 of rule 6, the power to consider and sustain a motion to affirm obtains, where the assignments of error on the merits are obviously and unquestionably frivolous, or when it is patent the writ of error is prosecuted for delay merely, or where it is evident on the face of the record that the question on the merits is not open to possible contentions, because it has previously been so specifically and adversely ruled on by this court as to absolutely foreclose further contention on the subject."

Our contention is that the question of discrimination sought to be raised here, has "previously been so specifically and adversely ruled on by this court as to absolutely foreclose further contention on the subject."

The case of *Stephenson Iron Mining Co. v. Kibbe,* 205 U. S. 536, was removed to this court on writ of error to the circuit court for the District of Minnesota. It involved a statute of the State of Minnesota, which has been held valid in *Kline v. Minnesota Iron Co.,* cited above. Sanborn, Circuit Judge, in deciding the *Kibbe* case, said:

"The Supreme Court of Minnesota has decided that Sec. 2701 governs the relation of master and servant, and the liability of the former to the latter when they are engaged in the operation of a short railroad, owned and operated by a mining corporation, which is not a railroad corporation, for the sole purpose of operating its mine, and that the statute thus construed does not violate any provision of the Constituion of the State of Minnesota. It has been held that this statute applies not to railroads as such, but to railroad hazards; that it governs 'all persons and corporations operating a line of railroad incident to which are the hazards and risks intended to be guarded against,' and that the statute thus construed is not violative of the Constitution of the State. *The decisions of the Supreme Court have placed beyond debate the proposition that State legislation thus construed is within the police power of the Sate and does not violate the Constitution of the United States. Missouri Pac. v. Mackey,* 127 U. S. 205; *Holden v. Hardy,* 169 U. S. 393; *St. Louis Consolidated Coal Co. v. Illinois,* 185 U. S. 203; 136 Fed. 147."

The case was affirmed orally in this court, 205 U. S. 537, citing *Minnesota Iron Co. v. Kline, supra,* which so nearly fits the case at bar that we call particular attention to it, as plaintiff in error seems to feel that it is exempt from the rule, because it is not a common carrier.

In the *Mackey* case the defendant railway was a common carrier, and this court had said:

"But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public."

This language was seized upon by the appellant in the Kline case, upon which to found a distinction, limiting the reasonableness of classification to common carriers, or public railways, the Minnesota Iron Company operating a mere private railway, described in the opinion of Mr. Justice Holmes as follows:

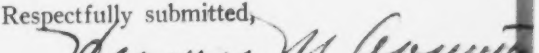
"The track on which the accident happened was a narrow-gauge track on which dump cars were run by the defendant, a mining company, for the purpose of stripping the earth from the surface of the mine."

And of this contention the court said:

" * * * Of course, there is no objection to legislation being confined to a peculiar and well defined class of perils, and it is not necessary that they should be perils which are shared by the public, if they concern the body of citizens engaged in a particular work."

In concluding the opinion, it was said the appeal was "merely one of the many attempts to impart an overmathematical nicety to the prohibitions of the Fourteenth Amendment," which seems to us apt description for the assignment of error in this case.

Respectfully submitted,



Counsel for Defendant in Error.

EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]

No. [redacted] 56

ALUMINUM COMPANY OF AMERICA, PLAINTIFF IN ERROR,

vs.

GEORGE H. RAMSEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

RECORD FILED MAY 24, 1900.

(21,694)

(21,694)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 468.

ALUMINUM COMPANY OF AMERICA, PLAINTIFF IN ERROR,

vs.

GEORGE H. RAMSEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 26, 1910.

(Record, page 2.)

Saline Circuit Court.

GEORGE H. RAMSEY, Plaintiff,
vs.
ALUMINUM COMPANY OF AMERICA, Defendant.

Complaint at Law.

The defendant is a corporation organized under the laws of the ate of Pennsylvania as the Pittsburg Reduction Company and s lately changed its name to the Aluminum Company of America, d is authorized to do business in the State of Arkansas and has signated J. F. Loughborough of Little Rock, Arkansas, as its gent for service of process in Arkansas.

The Defendant company operated a mill at Bauxite in Saline unty, Arkansas for the treatment of bauxite ore and operates in nnection with said mill a railway running from points adjacent here ore is mined, and is transported over said railway to Defend-nt's mill.

The Plaintiff has been employed by the Defendant company as gineer of an engine operated by said company in hauling trains ore from the mines to the mill over said line of railway. On ne 18th, 1907, the defendant was operating said railway train, d plaintiff was serving as engineer of the same in hauling ore om the mines to the mill, and proceeding according to defendant's stoms and instructions plaintiff approached the mill of defend-nt with a train of loaded cars and plaintiff and defendant's serv-nts and agents in charge of said train proceeded to switch said aded cars onto defendant's siding or switch running into the e bin at said mill. Before approaching said switch the defend-nt as was its custom caused the engine to be uncoupled from the ain, and observing that the switchmen whose duty it was to open id switch were at their post of duty plaintiff proceeded with the gine ahead of said train of cars and passed the switch, and relying pon said switchmen to open said switch and allow said cars to pro-ed upon said siding the plaintiff, as was his duty, stopped said en-ine and dismounted from the cab or place of operation of the same nd proceeded to clean out or renew the fire of said engine, and while engaged through the negligence and carelessness of defendant, s servants and agents, said train of cars was allowed to bump into id engine because of the negligence of said switchmen in not open-ng said switch, causing it to run over and mangle plaintiff's leg in uch manner that said leg had to be amputated.

The plaintiff is a young man, twenty-one years of age, with no ther occupation or means of livelihood, and is now maimed and ripped for life, and has suffered great mental and physical anguish, ain and suffering, and continues so to *fuffer*, and is deprived of

his means of livelihood and damaged in the sum of Forty Thousand Dollars, and alleges that said injuries were caused by the negligence and carelessness of defendant, its agents and servants in not switching said cars and not operating said train with care, as alleged, and in not providing adequate means and facilities.

Wherefore plaintiff prays for judgment in the sum of Forty Thousand Dollars, with costs, and all other proper relief.

MEHAFFY, WILLIAMS AND ARMISTEAD,
Att'ys for Plaintiff.

Endorsed: "Filed July 10th, 1907. W. M. Steed, Clerk."

* * * * * * *

(Record, page 6.)

In Saline Circuit Court.

No. 1138.

GEORGE H. RAMSEY
vs.
ALUMINUM COMPANY OF AMERICA.

Answer.

Defendant denies that it has a railway running from points where bauxite is mined to defendant's mill, but says it is true that it has a mill tram-way at those points that is used for the purpose of hauling ore to its mill. Defendant denies that on the — day of June, 1907, it caused the engine on which plaintiff was engineer to be uncoupled from the train, and denies that plaintiff observed that the switchmen whose duty it was to open said switch were at their posts of duty, as alleged in the complaint, and denies that the plaintiff proceeded with said engine ahead of said train of cars to pass said switch and relying upon said switchmen to open said switch and allow said cars to proceed upon said siding, as alleged in the complaint. It denies that while plaintiff was engaged in cleaning out and renewing the fire in said engine that it, its servants or agents either negligently, carelessly or at all allowed the said train of cars to bump into said engine, causing it to run over and mangle plaintiff's leg in such a manner that said leg had to be amputated, as alleged in the complaint.

Defendant has no information as to plaintiff's age, and therefore denies that he is twenty-one years old, as alleged in the complaint, and denies that he has no other occupation or means of livelihood. Denies that he is deprived of his means of livelihood and damages in the sum of $40,000, or any other amount, and denies that said alleged injuries were caused by any negligence or carelessness of this defendant, its agents or servants in not switching said cars properly and not operating said train with care and not providing adequate means and

facilities for the careful operation of said train in switching cars, as alleged in the complaint.

Defendant says that any injuries which plaintiff received at the time and place mentioned in the complaint were due to his own carelessness and fault, and for which this defendant is not liable.

Wherefore defendant prays judgment herein.

J. W. WESTBROOK,
ROSE, HEMINGWAY, CANTRELL, & LOUGHBOROUGH,
For Defendant.

Endorsed: "Filed Sept. 5th, 1907. W. M. Steed, Clerk."

* * * * * * *

(Record, page 9.)

In Saline Circuit Court.

GEORGE H. RAMSEY
vs.
ALUMINUM COMPANY OF AMERICA.

Amended Answer.

Defendant denies that it has a railway running from points where bauxite is mined to defendant's mill, but says it is true that it has a mill tram-way at those points that is used for the purpose of hauling ore to its mill. Defendant denies that on the — day of June, 1907, it caused the engine on which plaintiff was engineer to be uncoupled from the train, and denies that plaintiff observed that the switchmen whose duty it was to open said switch were at their posts of duty, as alleged in the complaint, and denies that the plaintiff proceeded with said engine ahead of said train of cars to pass said switch and relying upon said switchmen to open said switch and allow said cars to proceed upon said siding, as alleged in the complaint. It denies that while plaintiff was engaged in cleaning out and renewing the fire in said engine, that it, its servants or agents either negligently, carelessly or at all allowed said train of cars to bump into said engine, causing it to run over and mangle plaintiff's leg in such manner that said leg had to be amputated, as alleged in the complaint.

Defendant has no information as to plaintiff's age, and therefore denies that he is twenty-one years old, as alleged in the complaint, and denies that he has no other occupation or means of livelihood. Denies that he is deprived of his means of livelihood and damaged in the sum of $40,000 or any other amount. And denies that said alleged injury was caused by any negligence or carelessness of this defendant, its agents or servants in not switching said cars properly and not operating said train with care, and not providing adequate means and facilities for the careful operation of said train in switching cars, as alleged in the complaint.

Defendant says that any injuries which plaintiff received at th time and place mentioned in the complaint were due to his own care lessness and fault in his management and operation of his engin and train of tram-cars and in his failure to keep a lookout for sai cars, and for which this defendant is not liable.

2.

For further defense, defendant says, that the switchmen of whos conduct plaintiff complains in his complaint were fellow servant with him, and even had they been negligent and such negligenc produced the injury complained of by plaintiff, this defendant is no liable therefor.

J. W. WESTBROOK,
ROSE, HEMINGWAY, CANTRELL, &
LOUGHBOROUGH,
For Defendant.

Endorsed: "Filed Sept. 12" 1907. W. M. Steed, Clerk."

(Record, page 11.)

In the Saline Circuit Court.

GEORGE H. RAMSEY
vs.
ALUMINUM COMPANY OF AMERICA.

Amendment to Answer in Response to Motion that it Be Made Mo Specific.

Comes the defendant, and in response to plaintiff's motion that set forth specifically the plea of contributory negligence herein, says That the plaintiff's negligent acts contributed to cause the injur of which he complained herein, by reason of his failure to see tha everything was in proper readiness to make the flying switch whic he proposes to make, and to wait until defendant's servants were i the proper place to assist him in making said switch if he desire th m to assist him, and in his uncoupling the engine from the ca and leaving his position on his engine to do so, and in endeavoring t uncouple his engine and make the flying switch when there was n one present to throw the switch; and was guilty of negligence co tributing to his injury in not stopping his engine and securing suf cient assistance to make the flying switch before embarking on suc a dangerous undertaking; and was negligent in not keeping a lookou to ascertain that sufficient help was nearby to assist him in makin the switch; and was negligent in uncoupling his engine from th cars; and was negligent in not ascertaining that the cars did not tak the switch after his engine had passed it; and was negligent i not keeping a lookout for said cars; and was negligent in standin on the ground behind his engine for the purpose of firing it; an was negligent in standing upon or between the rails of the trac

on which his engine was, and exposing himself to danger from the cars that were following his engine.

J. W. WESTBROOK,
ROSE, HEMINGWAY, CANTRELL, & LOUGHBOROUGH,
For Defendants.

Endorsed: "Filed Sept. 17" 1907. W. M. Steed, Clerk.'

* * * * * * *

(Record, page 207.)

XXVI.

If you find from the evidence that defendant is a corporation, incorporated under the laws of Pennsylvania for the purpose of manufacturing aluminum, and that it is engaged in the business in this State as a foreign corporation, and that its plant in this State is used for the purpose of mining and drying bauxite; and that in connection with its plant it has a tram-way leading from the mines to its drying plant, and that on said tram-way tram-cars are operated, and that some are moved by hand and some are moved with a steam engine; and that said tram-way does not carry freight and passengers for the public, nor does it propose to do so, and is not incorporated for that purpose, nor operated as a railroad or railway company, then you are instructed that the expression "railroad companies operating within this State, whether incorporated or not," used in the Act of the legislature of 1907, approved March 8th, 1907, and known as "The Fellow Servant Law," does not apply to the operation of defendant's tram-way.

XXVII.

You are instructed that the Act of the legislature, approved March 8th, 1907, known as "The Fellow Servant Law" in providing that it shall apply to all corporations but shall not apply to individuals, persons or partnerships, except those engaged in the operation of a railroad or coal mine, denies to this defendant the equal protection of the law, and is in violation of the Fourteenth Amendment to the Constitution of the United States.

XVIII.

You are instructed that the Act of the legislature of 1907, approved March 8th, known as "The Fellow Servant Law," does not apply to defendant.

XXIX.

You are instructed that the defendant is not a railway company within the meaning of the Act approved March 8th, 1907, which provides that railway companies shall be liable for injuries to one of their employés occasioned by the negligence of a fellow servant.

XXX.

You are instructed that the defendant is not a railway company within the provisions of the Act of February 28, 1893, defining who are fellow servants of railway companies.

(This instruction was withdrawn by defendant on the concession of plaintiff that the act does not apply.)

XXXI.

If you find from the evidence that plaintiff was engineer on defendant's engine, and also that he had control of the operation of the train, that the duty of the brakeman on the train was to set the brakes on the cars and thereby assist in the operation, and that the duty of the switchmen was to turn the switch for the cars to go into the shed, and that the said switchmen and brakemen had no superintendence and control over plaintiff, but that they were all working for defendant for the common purpose of bringing cars from the mines and switching them into defendant's shed, then you are instructed that they are all fellow servants, and plaintiff cannot recover from defendant because of any act of negligence on the part of either of the brakemen or of either of the switchmen.

XXXII.

You are instructed that if you find from the evidence that plaintiff's injury was caused by the acts, or failure to act, of one of defendant's switchmen, plaintiff cannot recover for such injury against the defendant, although the said switchman may have been guilty of negligence which caused the injury and plaintiff may have been without contributory negligence.

XXXIII.

You are instructed that defendant's switchmen were fellow servants with plaintiff, and plaintiff cannot recover against defendant for any negligent acts of his fellow servants.

XXXIV.

You are instructed that, Pipkin, foreman of the mill, was a fellow servant with the plaintiff, and plaintiff cannot recover in this action, even if his injury was caused by the negligence of the said Pipkin.

—XXV.

If you find from the evidence that plaintiff's injury was caused by the negligence of another employé of defendant who was so related to plaintiff in the work they each performed for defendant as to ordinarily be exposed to injuries caused by each other's negligence, your verdict will be for defendant.

XXXVI.

If you find from the evidence that plaintiff's injury was caused by the negligence of another employé of defendant's who was in the same department of service with plaintiff and neither had superin-

tendence or control over the other in directing his work or in the manner of doing it, your verdict will be for the defendant.

* * * * * * *

(Record, page 222.)

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of November, A. D. 1908, at the Courthouse in the City of Little Rock, the following proceedings were had, to-wit: On the first day of March, 1909, a day of said term:

No. 418.

ALUMINUM COMPANY OF AMERICA, Appellant,
vs.
GEORGE H. RAMSEY, Appellee.

Appeal from Saline Circuit Court.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Saline County, and was argued by counsel, on consideration whereof it is the opinion of the Court that the verdict and judgment in this cause are excessive; but the evidence being sufficient to sustain a verdict for $12,000.00 damages.

It is therefore ordered that if the appellee will enter a remittitur within fifteen juridical days of all of said judgment down to Twelve Thousand Dollars, the same will be affirmed for that amount; otherwise said judgment will be reversed and remanded.

Battle and Wood, JJ. dissent.

* * * * * * *

(Record, page 247.)

In the Supreme Court of Arkansas.

No. 518.

ALUMINUM COMPANY OF AMERICA
vs.
GEORGE H. RAMSEY.

Assignment of Errors.

And now comes the Aluminum Company of America, plaintiff in error, and says that in the record aforesaid there is manifest error, and it hereby states that the errors therein which it intends to rely on at the hearing are as follows, to-wit:

1. The Supreme Court of Arkansas erred in holding and deciding that the Act of the legislature of the State of Arkansas, approved March 8th, 1907, and entitled, "An Act to give right of action against an employer for injuries or death resulting to his agents, employees or servants, either from the employer's negligence or from the negligence of some of his other employees, servants or agents, and to repeal all acts and parts of acts in conflict herewith," was not repugnant to the Fourteenth Amendment to the Constitution of the United States and that the judgment of the Saline Circuit Court in this cause did not deny plaintiff in error equal protection of the law.

2. The Supreme Court of Arkansas erred in holding and deciding that the act of the legislature of the State of Arkansas, approved March 8th, 1907, and entitled, "An Act to give right of action against an employer for injuries or death resulting to his agents, employees or servants, either from the empolyer's negligence, or from the negligence of some of his other employees, servants or agents, and to repeal all acts and parts of acts in conflict herewith," was not repugnant to the Fourteenth Amendment to the Constitution of the United States, and that the judgment of the Saline Circuit Court in this cause did not deprive plaintiff in error of its property without due process of law, in violation of said amendment.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys for Aluminum Company of America.

Filed March 26, 1909. P. D. English, Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

ALUMINUM COMPANY OF AMERICA.....

.....*Plaintiff in Error*

v. No. 468.

GEORGE H. RAMSEY.....*Defendant in Error*

BRIEF IN REPLY TO MOTION TO DISMISS OR AFFIRM UNDER RULE 6.

STATEMENT.

The excerpts from the record that are now printed contain the pleadings and instructions of the trial court pertinent to the Federal question involved and the opinion of the Supreme Court of the State of Arkansas in the case is printed in the brief for defendant in error. Excerpts are not printed showing the facts with reference to the particular kind of business engaged in by plaintiff in error or that it was engaged in that business in the State of Arkansas prior to the act of March 8, 1907, which is particularly shown by

the testimony in the record. The facts shown by the unprinted portions of the record are that plaintiff in error is a corporation organized under the laws of Pennsylvania and was engaged in the manufacture of aluminum; that it had a plant at East St. Louis, one at Niagara Falls, and one at Pittsburg for the carrying on of its manufacturing; also that it had a plant in Arkansas, where the bauxite was crushed and dried and shipped to other plants for further treatment; that the plant in Arkansas consisted of machinery for handling and drying bauxite and loading it on cars, and it also had a tram road on which the bauxite was loaded into dump cars and from them dumped into the drying cylinders. The nature and extent of this tram road is shown by the unprinted testimony. For the information of the court we may say that these tram cars were very small affairs and ran upon rails set at a narrow gauge, were moved by hand sometimes and by an engine sometimes, the office of the tram cars being particularly for the convenience of speedily moving the material to the drying shed and dumping it, an operation that could not be nearly so well conducted by teams and wagons. This tramway was in no sense a railroad, unless that term should be considered to extend to every kind of conveyance for cars that roll upon rails.

The motion to dismiss on the ground that the court has no jurisdiction is based upon the idea that the act of the Legislature of Arkansas, approved March 8, 1907, known as the "Fellow Servant Law," in describing the

things on which it is made to operate as follows: *"All railroad companies operating within this State, whether incorporated or not, and all corporations of every kind and character, and every company, whether incorporated or not, engaged in the mining of coal,"* comprehends the business of the plaintiff in error in the use of the terms "all railroad companies operating within this State, whether incorporated or not;" and the argument is that if plaintiff in error is covered by this language, even though the act extends to all corporations, this feature of it could be eliminated and the act sustained. This argument involves the inquiry whether plaintiff in error is within the terms of the act wherein it applies to "all railroad companies operating within the State of Arkansas, whether incorporated or not," and this in turn involves an inquiry into the business done by the plaintiff in error. We are satisfied that this court will not hold that plaintiff in error is a railroad company operating within this State, and that the terms "whether incorporated or not" do not extend the prior clause to the operations of a corporation engaged in the manufacturing business solely and using a small tramway for convenience in handling its raw material.

In Riley v. Galveston City Ry. Co. 13 Tex. Civ. App. 247, 34 S. W. 826, it was held that the statute of the State of Texas abolishing the fellow servant doctrine as to "any railway corporation," did not extend to street railway companies, and street railway companies have been generally held not to be within the term "railroad" used in such

statutes. See also Fidelity Loan & Trust Co. v. Douglas, 104 Ia. 532.

The statute of Arkansas is not open to the construction that it should apply to any other class of business except that ordinarily understood by the term "railroad company." The occasion for abrogating the fellow servant doctrine in instances of railroad companies rests upon the peculiar hazards of railroading; that is, the large number of fellow servants that contribute to the operation of trains, making it impossible for one servant to know or even be acquainted with all the servants, the risks of whose negligence he would assume under the fellow servant doctrine. The inanimate agencies employed by railroads are no more dangerous than those employed in many other businesses. Thus the act also manifestly intended to include corporations like the plaintiff in error by the terms "all other corporations." Thus the act operates specifically upon railroad companies, mining companies and all other corporations, plaintiff in error being included under the last designation.

In Minn. Iron Co. v. Kline, 199 U. S. 593, this court merely adopted the construction of the statute of Minnesota that was placed upon it by the highest court of that State. There is a difference in the language of the Minnesota statute and the statute of Arkansas under consideration, and an obvious difference in the business upon which each was designed to operate. In that case the Supreme Court of Minnesota had construed its statute to apply to the operations of the plaintiff in error within the terms "owning and

operating a railroad in this State." In the case now before the court *the statute in question was construed in its entirety* as being constitutional under the reserved power of the State to alter or amend the charters of corporations, and has been construed to operate upon all corporations.

In Ozan Lumber Co. v. Biddie, 87 Ark. 587, the statute in question was before the Supreme Court of Arkansas in a case where the plaintiff was injured in work about a saw mill. The act was assailed as being opposed to the Fourteenth Amendment, and the court held that it was not because of the power of the State to alter and amend the charters of corporations. On page 593 it is said: "We think the act in question is constitutional as to corporations."

In the opinion of the Supreme Court of Arkansas in this case the argument of the present plaintiff in error that the act denied it the equal protection of the law was disposed of by the court in the following language:

"The act of our Legislature approved March 8, 1907, which abolishes in this State the common-law rule that a servant assumes the risk of the negligence of his fellow servant, has been sustained by the court in the case of Ozan Lumber Company v. Biddie, 87 Ark. 587, decided since the trial of this case in the court below. Hence it is not necessary to notice the refusal to give these instructions which were asked by the appellant and which were based upon the unconstitutionality of that act, except to say that the opinion

in the case of Ozan Lumber Company v. Biddie is in accord with the modern text writers on the subject, and as well the great majority of the adjudicated cases."

It will thus be observed that the Supreme Court of Arkansas did not consider the question whether the statute was within the definition of "railroad companies operating within this State, whether incorporated or not," nor did it consider whether this feature of the act would be separable from the feature extending the provisions of the act to the operation of all corporations, so that the act was separable and the former could be sustained if the latter was unconstitutional.

It will be noticed that the Supreme Court of Arkansas in this case expressly refused to decide that plaintiff in error was a railroad company within the act. The following language of the opinion of that court sufficiently indicates this:

"Hence it is not necessary to notice the refusal to give these instructions which were asked by the appellant, and which were based upon the unconstitutionality of that act."

The instructions asked of the lower court and refused were as follows:

XXVI.

If you find from the evidence that defendant is a corporation, incorporated under the laws of Pennsylvania for the purpose of manufacturing aluminum, and that it is engaged in the business in this State as a foreign corporation, and that its plant in this State is used for the purpose

of mining and drying bauxite, and that in connection with its plant it has a tramway leading from the mines to its drying plant, and that on said tramway tram cars are operated, and that some are moved by hand and some are moved with a steam engine; and that said tramway does not carry freight and passengers for the public, nor does it propose to do so, and is not incorporated for that purpose, nor operated as a railroad or railway company, then you are instructed that the expression "railroad companies operating within this State, whether incorporated or not," used in the act of the Legislature of 1907, approved March 8, 1907, and known as the "Fellow Servant Law," does not apply to the operation of defendant's tramway.

XXIX.

You are instructed that the defendant is not a railway company within the meaning of the act approved March 8, 1907, which provided that railway companies shall be liable for injuries to one of their employees occasioned by the negligence of a fellow servant.

These instructions, numbered XXVI and XXIX, are shown on the printed record on pages 5 and 6; also the conceded proposition of law set forth in instruction XXX (printed record, p. 6):

"You are instructed that the defendant is not a railway company within the provisions of the Act of February 28, 1893, defining who are fellow servants of railway companies."

In the copy of the opinion of the Supreme Court of Arkansas in this case on page 21 of the brief of defendant in error, appears the statement that instructions numbered 26 to 36, inclusive, pass out of the case. As the instructions quoted were among these instructions it is very evident that the Supreme Court of Arkansas did not consider the question whether plaintiff in error was a railroad company.

The assertion of counsel on page 39 of their brief that defendant operates a railway has no foundation in fact, and was not decided by the Supreme Court of Arkansas; nor has a precedent for such decision been made by this court except contrary to the contention of the defendant in error.

In Kennefick Hammer Co. v. Rohr, 77 Ark. 290, the employer was engaged in constructing a railway, but the fellow servant act then in force, applying to railroad companies, was not applied in the case, the rights of the parties being decided under the common-law definition of fellow servants.

In a decision of the Supreme Court of Arkansas rendered December 6, 1909, in a case styled Soard v. Western Anthracite Coal & Mining Company, it was contended that the defendant was not "engaged in mining coal" within the meaning of the act of March 8, 1907, known as the "Fellow Servant Act," and the court held:

"It is unnecessary to determine whether or not appellee was 'engaged in mining coal' within the meaning of the

statute in question, as it is a corporation, *and the statute applies to all corporations without regard to the particular business in which they are engaged.*"

The other contention of defendant in error is that if there is a Federal question the merits of it are foreclosed by the previous adjudications of this court, and that the question is frivolous, and the case should be affirmed.

Whether the act is severable if unconstitutional in part has not been decided. We are of the opinion it is not.

Connolly v. Union Sewer Pipe Co., 184 U. S. 565.

THE FEDERAL QUESTION AND ITS IMPORTANCE.

In our opinion the Federal question presented in this c[illegible] is of no less importance than involving the question whether corporations are within the equal protection clause of the Fourteenth Amendment, and if the constitutionality of the act of the Arkansas Legislature abolishing the fellow servant doctrine as to all corporations, irrespective of kinds of business or any semblance of classification, is a valid exercise of the State's power, then it must follow that by pursuing a certain form a State can withhold from corporations the provisions of the Fourteenth Amendment, and by pursuing a form prescribed by itself prevent the operation of the Federal Constitution in part or entirely, according to the will of the State upon all corporations.

In Ballard v. Miss. Cotton Oil Co., 81 Miss. 557; 34 So. Rep. 533, a statute identical with the one under con-

sideration, was held invalid as opposed to the Fourteenth Amendment. The opinion shows that the case was thoroughly and well considered. In that case the statute of the State of Mississippi abrogated the fellow servant doctrine as applied to all corporations in very much the same language as does the Arkansas statute, and in holding that it was contrary to the provisions of the Fourteenth Amendment and therefore invalid, the court said:

"Our conclusion after the most careful and protracted consideration is that section one of the act of 1898 violates the Fourteenth Amendment of the Constitution of the United States in that it imposes restrictions on all corporations without reference to any difference arising out of the nature of their businesses, which are not imposed upon natural persons, and thus denies to corporations the equal protection of the law."

Perhaps the Supreme Court of Arkansas would have been of the same opinion had it not been that it considered its power over corporations absolute by virtue of a provision of the State Constitution giving the State the power to alter or amend charters. The inference is that the Supreme Court of the State of Arkansas considered that the statute in question denied to corporations the equal protection of the law, but that the State had the right to do this under its power to alter and amend. The question then presented is, whether under the power to alter and amend charters of corporations, a State may abrogate the Constitution and laws of the United States as to corporations.

Such a decision has not only never been rendered by this court, but, on the contrary, all of the opinions of this court in cases where a consideration of the power of the State over corporations to pass laws conflicting with the laws of the United States was involved, this court has in unmistakable terms held and repeatedly taken occasion to say that this power could not be exerted in violation of rights assured by the Constitution and laws of the United States.

If any force was added to a law otherwise unconstitutional by saying it was under the reserve power of the State to alter and amend charters of corporations any unconstitutional act applying to corporations could be made constitutional by the announcement by the Legislature that it was enacted under the reserve power to alter and amend; or, if the Legislature failed to make this announcement and the courts of the State in construing the statute ascertained that the intention of the Legislature was to pass it under this reserved power, this matter of form would have prevented the operation of the United States Constitution and laws.

Suppose, instead of the statute now before the court, the Legislature of Arkansas had passed an act providing in express terms that thereafter corporations doing business in the State should not be entitled to the protection of the equality clause of the Fourteenth Amendment to the Constitution of the United States, and the Supreme Court had held that this act was valid under the reserved power of the State to alter and amend charters. If the statute before the

court does deny to corporations the equal protection of the law it is unconstitutional to the same extent as would be a statute expressly providing that corporations should not be entitled to the equal protection of the law.

We certainly do not controvert the right of each State to provide the terms and conditions upon which it shall create corporations and the terms and conditions upon which it shall admit foreign corporations to do business within the State; but these conditions will be invalid if they deny the rights or coerce the surrender of rights secured to corporations by the Constitution and laws of the United States. Had the statute in question prohibited corporations from doing business in the State it would have been constitutional, and the courts would not inquire into the motives that induced the passage of the law. Had that been done, no right guaranteed under the Federal Constitution and laws would have been invaded, nor would these laws have been set at defiance by the State. But had an act provided that corporations could only do business in the State upon their surrender of their rights under the Federal Constitution and laws, the act would have been invalid. And so, if an act admits corporations to do business in the State, but withholds from them the equal protection of the law, the Constitution of the United States has been abrogated to this extent, and the statute would be invalid.

Statutes of this kind have been passed making the express condition upon which corporations should be admitted to the State, that they should surrender their right of re-

moval to the Federal Court, and such acts have been uniformly held to be invalid. As was said by Justice Field in Yick Wo v. Hopkins, 118 U. S. 368, "The equal protection of the laws is a pledge of the protection of equal laws," and in applying the Arkansas statute to all corporations the Legislature and judiciary of the State of Arkansas has denied to corporations the protection of equal laws. If an individual or partnership was engaged in the same business as was plaintiff in error at practically the same point in the State, employing the same number of men and with the same appliances, and one of them should have been hurt under the circumstances under which defendant in error was injured, the individual or partnership would not have been liable; and the only possible difference between the imagined case and the present case would be that one was an individual or partnership and the other a corporation. Manifestly the law does not operate equally. It is a matter of common knowledge that individuals and partnerships can and do engage in practically the same businesses as do corporations, and to say that a corporation shall be liable under exactly similar circumstances where it is said the individual or partnership shall not be liable, must deny to corporations the equal protection of the law. There is no possible classification except the arbitrary one, that one is a corporation and the other is an individual or partnership. If legislation of this kind by the State is valid, there is no limit to the doctrine except the absolute abrogating of the Federal Constitution and laws as applied to corporations. The corpora-

tions are then without these laws and entitled to none of their protection. It naturally follows that if the equal protection of the laws as to particular liabilities may be denied by the States the entire scope of the Fourteenth Amendment may be denied; and if the equality of the laws could be denied, the due process clause could also be denied, the right of removal to the Federal court could be denied, any proceedings for the proof of claims or voting by corporations under the bankruptcy act could be denied, they could be subjected to *unreasonable* searches and seizures, the obligations of contracts could be impaired, they could be prohibited from using the United States mails or from engaging in interstate commerce, or from doing business with national banks—all under the reserved power to alter and amend charters—and there would exist a large class of business operations in a State, or several States, that would be without the pale of the United States Constitution and the laws thereunder, because a form had deprived them of the right. Considering the power to alter and amend charters of corporations and assuming that the grant of charters to corporations and the admission of foreign corporations to do business in the State would be contrary to the Fourteenth Amendment, if there was exacted a surrender of the rights thereunder, where is the difference between saying that the equality clause shall not apply to corporations, and enacting a law, or system of laws, that denies to corporations the operation of the clause? In the one case it is forbidden, and in the other forcibly withheld. It is inoperative in

either. There is a difference in prohibiting the formation of corporations or their admission, and forming them or admitting them only on the condition that they surrender rights guaranteed under the Constitution. The first does not violate the supreme law; the other does. There is a legal as well as a moral difference between prohibiting a man from coming into one's house and admitting him only on condition that he renounce his rights under the law; between forbidding him to enter at all and allowing him to enter on condition that you may assault him. Such consent would not validate your breach of the law in assaulting him.

We do not deny that the State may enact very many laws that apply only to corporations, and that these laws will be constitutional under the United States Constitution. The nature of the entity of a corporation and many other distinguishing features properly require a classification of many of its affairs and operations. The conduct of corporate organization, elections, appointment of officers, appointment of agents for service of process, payment of license fees, taxes on the franchise, and very many other features subject corporations to classifications for special legislation; but it must be confessed that the statute now before the court is not based upon any classification of the nature of business, circumstances, surroundings or conditions that warrants the imposing of a liability on it, not imposed on individuals or partnerships. The situation of corporations and the situation of individuals and partnerships under the act are exactly alike, and the statute imposes a purely arbi-

trary classification, apparently only sustained by the Supreme Court of Arkansas on the ground that this may be done under the reserved power to alter and amend charters. Our estimate of this case is that it involves a most important constitutional question, and one in which the plaintiff in error is clearly in the right, and we regret that the time limited for response to the motion of defendant in error is so short that we cannot give more time and care to the presentation of our views.

In view of the importance of the question presented, we trust that the court will pardon what may appear to be a review of some of the decisions of this court on what are considered elementary propositions.

In Missouri v. Lewis, 101 U. S. 30, it is said:

> "The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount or finality of decision, if all persons within the territorial limits of the respective jurisdictions have an *equal right, in like cases, and under like circumstances, to resort to them for redress.*"

In Hays v. Missouri, 120 U. S. 68, it is said:

> "It (the Fourteenth Amemndment) merely requires that all persons subject to such legislation shall be treated alike *under like circumstances and conditions, both in the privileges conferred and the liabilities imposed.*"

In Barbier v. Connolly, 113 U. S. 27, it is said:

> "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in

its application, if within the sphere of its operation it affects alike *all persons similarly situated,* is not within the amendment."

In Lowe v. Kansas, 163 U. S., on page 88, it is said:

"As the statute is applicable to all persons under like circumstances, and does not subject the individual to an arbitrary exercise of power, it has not denied him the equal protection of the laws."

In Duncan v. Missouri, 152, U. S. 377, on page 382, it is said:

"The equal protection of the laws is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the power of the government."

In Jones v. Bain, 165 U. S. 184, it is said:

"The statute being general in its application, embracing all persons under substantially like circumstances, and not being *an arbitrary exercise of power,* does not deny to the defendant the *equal protection of the laws."*

In Soon Hing v. Crowley, 113 U. S. 709, it is said:

"The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions."

It was early decided that corporations were persons within the meaning of the equal protection clause.

Santa Clara County v. Southern Pacific Ry. 118 U. S. 394.

In Minneapolis Ry. Co. v. Beckwith, 129 U. S. 29, in reiterating the decision that corporations were within the protection of the equality clause, the court said:

> "The clause does undoubtedly prohibit discriminating and partial legislation by any State in favor of particular persons as against others in like condition. Equality of protection implies not merely accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but *equal exemption with others in like condition from charges and liabilities of every kind.*"

In Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S. 154, it is said:

> "The rights and securities guaranteed to persons by that instrument (the Constitution) cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

THE APPARENT DENIAL OF EQUAL PROTECTION MUST REST UPON SOME REAL BASIS OF CLASSIFICATION.

In Gulf, Colorado & Santa Fe Ry. v. Ellis, *supra*, it is held that the classification "must always rest upon some difference which bears some reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis." Continuing, Mr. Justice Brewer said (p. 158): "And any classification for the imposition of such special duties—

duties arising out of the peculiar business in which they are engaged—is a just classification, and not one within the prohibition of the Fourteenth Amendment." And on page 165, he continues: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

While there were dissents in this case it will be noticed that the dissents were on the point that the classification in that case was not arbitrary. Other instances of the importance of a real basis of classification are furnished by the following:

N. Y. etc., Ry. v. Bristol, 151 U. S. 511;

N. Y., etc., Ry. v. New York, 165 U. S. 633;

Cargill Co. v. Minnesota, 180 U. S. 469;

Chicago R. R. Co. v. Pontius, 157 U. S. 211;

Atchison, T. & S. F. Ry. v. Matthews, 174 U. S. 96;

St. L. & S. F. Ry. v. Matthews, 165 U. S. 1.

In the nature of things a wide discretion in the matter of classification is vested in the State, and if the classification is observed to rest upon any real basis of difference in

circumstances or conditions, and not purely arbitrary, it will be sustained. Presumptions in favor of a classification are indulged.

In Orient Ins. Co. v. Daggs, 172 U. S. 562, it is said:

> "Classification for such purposes is not invalid because not depending on scientific or other marked differences in things, or persons, or their relations. It suffices, if it is practical, and is not reviewable unless palpably arbitrary."

These observations are made upon the classification of different kinds of insurance companies, which clearly indicated a difference in circumstances and conditions.

In Ducat v. Chicago, 10 Wall, p. 415, it is said:

> "The power of the State to discriminate between her own domestic corporations and those of other States desirous of transacting business within her jurisdiction, is clearly established in the case we have referred to (Paul v. Virginia), as it also has in the previous case of Augusta v. Earle. As to the nature or degree of discrimination it belongs to the State to determine, *subject only to such limitations on her sovereignty as may be found in the law of the Union.*"

In Connolly v. Union Sewer Pipe Co., 184 U. S. 540, the classification under the anti-trust statute was held to be arbitrary, because farmers were excluded from its provisions. And in Cotting v. Kansas City Stock Yards Co., 183 U. S. 112, the classification was held to be arbitrary because not applying to all under similar circumstances and conditions.

In Connolly v. Union Sewer Pipe Co., *supra,* Mr. Justice Harlan reviewed the previous decisions of this court

and approved the holding in G., C. & S. F. Ry. v. Ellis, *supra*, and the language of the decision, saying on page 560:

> "The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations in order to subserve public objects. For this court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

In the case just cited Mr. Justice McKenna dissented upon the ground that the classification under the Tennessee statute was not arbitrary, stating that a wide latitude was allowed to the Legislature, and that it was only a palpable abuse of the power of selection which would be reviewed.

In Lafayette Ins. Co. v. French, 18 How. p. 407, the court said:

> "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not *repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.*"

In Duluth & Iron Range R. R. Co. v. St. Louis Co., 179 U. S. 302, Mr. Justice White said (p. 305):

> "For this reason, we conclude that the act which it is asserted repealed or amended the contract (char-

ter) was void because a mere arbitrary exercise of power, giving rise, if enforced, not only to a denial of the equal protection of the laws, but to a deprivation of property without due process of law."

In the cases in which conditions have been imposed prohibiting the removal of cases to the Federal court, though not as strong as this one, because there is some reason in the argument that foreign corporations admitted into a State may be likened to domestic corporations, a feature which is not involved in the consideration of the statute now before the court, it has been uniformly held that statutes imposing upon foreign corporations the burden of not removing their cases to the Federal court, is an attempt to deprive these corporations of a right given to them by the Constitution and laws of the United States, and the conditions must therefore fail.

In Ins. Co. v. Morse, 20 Wall 445 (decided in 1874), it is held that a statute requiring that a corporation shall not remove a case to the Federal court and an agreement thereunder made by the corporation were invalid, the court saying:

> "A man may not barter away his life or his freedom or his substantial rights." * * * "A corporation has the same right to the protection of the laws as a natural citizen and the same right to appeal to all the courts of the country." * * * "The rights of an individual are not superior in this respect to that of a corporation." * * * "The State of Wisconsin can regulate its own corporations and the affairs of its own citizens, in subordination, however, to the Constitution of the United States."

After reviewing cases Mr. Justice Hunt continues:

> "None of the cases so much as intimate that conditions may be imposed which are repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by others."

The dissenting opinion of Justices Wait and [redacted] this case were on the theory that the State could impose any condition whatever, and on the further argument that those imposed in that particular case merely placed foreign corporations on the same level as domestic, and therefore did not infringe any rights under the Constitution.

In Doyle v. Continental Ins. Co., 94 U. S. 540, the license of the corporation was revoked because it removed a suit to the Federal court after stipulating that it would not do so, as a ground upon which it should be entitled to do business in the State. The court held the revocation valid, but approved the holding in Ins. Co. v. Morse, *supra*, and distinguished that situation from the Morse case, saying:

> "No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State is infringed; and this is what the State now accomplishes."

Justices Bradley, Swayne and Miller dissented, saying (p. 543):

> "Though a State may have the power, if it sees fit, to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose

unconstitutional conditions upon their doing so. Total prohibition may produce suffering and may manifest a spirit of unfriendliness towards sister States; but prohibition, except upon conditions *derogatory to the jurisdiction and sovereignty of the United States, is mischievous, and productive of hostility and disloyalty to the general government.* If a State is unwise enough to legislate the one, it has *no constitutional power* to legislate the other.

In Barron v. Burnsides, 121 U. S. 186, an employee of the corporation, was arrested for doing business of the corporation when it had not filed a stipulation agreeing not to remove cases to the Federal court, as required by a statute.

The court held the statute unconstitutional, saying (p. 200):

> "As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

This case is distinguished from Doyle v. Continental Ins. Co. upon grounds that are familiar to the members of this court, and need not be here set forth.

In Security Ins. Co. v. Prewitt, 202 U. S. 246, the decisions in Barron v. Burnsides and Ins. Co. v. Morse, *supra,* are approved, as is also the decision in Doyle v. Continental Ins. Co., the court being of the opinion that the Prewitt case was like the case of Doyle v. Ins. Co. This case was like the Doyle case in that the issue arose upon the contention by the corporation that it could not be ousted from doing business in the State. The dissenting opinions

of Justices Harlan and Day in this case are worthy of note in the application of their arguments there to the stiuation now before the court (p. 266).

> "If a State may lawfully withhold the right of transacting business within its borders or exclude a foreign corporation from the State upon the condition that they shall surrender a constitutional right given, in the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the State from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the State may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the State to exclude, includes the right, when exercised for any reason or for no reason, the State may say to the foreign corporation, You may do business within this State, provided you will yield all right to be protected against deprivation of property without due process of law; or provided you surrender your right to have compensation for your property when taken for private use; or provided you surrender all right to the equal protection of laws; and so on through the category of rights secured by the Constitution and deemed essential to the protection of people and corporations living under our institutions."

It will be noted that the opinion of the court in the Prewitt case, and the Doyle case, was on the ground that the corporation had no constitutional right to engage in business in the State, as it was not a citizen within the privilege and immunity clause of the Constitution; and as these cases were actions to oust the corporations they were distinguishable from the Burnsides and Morse cases because

in the latter cases the attempt was made to *enforce* the unconstitutional statute, and in the former the effort was made to enforce a right which the State possessed, of excluding the corporation. The argument of Justices Day and Harlan, which we have quoted as set forth in their dissenting opinion, would not be disputed, but the application of it to that case was denied. The application of this argument to the case at bar is not open to the dispute that was the ground for the distinction in the Prewitt case, and in the Doyle case. Whatever may have been the merits of this distinction, it is not necessary to consider in this case, as this case does not fall within the line of those authorities.

As indicating the importance of some real classification, if the court will indulge us, we will refer to a few of the leading cases merely as showing that no contrary doctrine has ever been announced by this court.

The language of Justice Field, in Horn Silver Mining Co. v. N. Y., 143 U. S. 395, has been much quoted as sustaining the absolute right of the States to deny to corporations the equal protection of the laws, but it will be noted that the litigation involved in that case presented the right of a State to tax the franchise of a corporation as property.

Ashley v. Ryan, 153 U. S. 436, involved the right of the State to charge a license fee based upon the entire capital stock of the corporation. It was held that the power existed. It will, of course, be observed that this dealt with the right of the State to permit or refuse admission of a cor-

poration to do business in the State and the amount of license fee that could be charged therefor. The terms imposed were not derogatory to the force or dignity of the Constitution and laws of the United States.

Hooper v. California, 155 U. S. 648, involved the right to require insurance agents to secure a license, a clear instance of proper classification. On page 656 of the opinion in this case it is said that the State power is "subject always, of course, to the paramount authority of the Constitution of the United States."

In Orient Ins. Co. v. Daggs, *supra*, the application of a valued policy law to fire insurance companies only is sustained and the classification held justified.

In Waters-Pierce Oil Company v. Texas, 177 U. S. 28, the statute under consideration prohibited corporations who had violated the anti-trust law of Texas from doing business within the State. The statute was upheld under the power to regulate corporations. The act exempted labor organizations from its provisions, and it was held that if this act was unconstitutional on that account, a prior act which did not contain the exemption was in force, and a suit could be sustained under that. The suit dealt with the punishment of a corportaion for violation of a criminal law, and the ouster from the State on this account was held to be justified.

In Philadelphia Fire Assn. v. N. Y., 119 U. S. 110, the point involved was the right to charge a foreign corpora-

tion a greater license fee than was charged domestic corporations. The act was held valid, the court observing (p. 118), that the right of the State to deal with corporations was "subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union."

The dissenting opinion of Justice Harlan is on the ground that the equal protection clause was violated by the discrimination.

It will be noted that this case presented the question of the amount of license fee that could be demanded, and was considered as being within a proper classification.

Southern Pacific Ry. Co. v. Denton, 146 U. S. 202, was a case involving the prohibition of the corporation to remove cases to the Federal court, and in holding that the statute was unconstitutional the court said:

> "But that statute requiring the corporation, as a condition precedent to doing business within the State, to surrender a right or privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions."

In Chattanooga, R. & C. Ry. Co. v. Evans, 14 C. C. A. 116, a case before the court of appeals for the Fifth Circuit, on page 120 of the report, Judge Lurton said:

> "Neither would a statute be valid which imposed any condition conflicting with the Constitution and laws of the United States."

At the risk of being considered tedious, we have referred to quite a number of cases that announce what may be considered well established principles of law, but our review of the cases has only been for the purpose of demonstrating that no decision of this court sustains the view expressed by the decision of the Supreme Court of Arkansas in this case, that under the reserved power to alter and amend charters of corporations, and under the power to provide conditions upon which they can do business, a State can, through any form, deny to a corporation the protection of the Federal Constitution and laws, and that this principle rests not alone upon the rights of the corporation, but also upon the supremacy and dignity of the Constitution and laws of the United States, and the mischief that would flow from their being abrogated under any circumstances; also to show that where broad expressions are used as to the power of States to deal with corporations, the language used has been with reference to some appropriate classification of corporations as such, or of some appropriate classification of a particular business.

In nearly all of the opinions in these cases the court has apparently taken pains to remark that the classification must not be arbitrary, and the right of the States to deal with corporations is in subordination to the Constitution and laws of the United States.

We know of but one case where the same question involved here was directly presented to an appellate court and passed upon, and that was in the case of Ballard v. Miss-

issippi Cotton Oil Company, *supra*. In that case it was held that the act was in violation of the Fourteenth Amendment. See also Johnson v. St. Paul & D. Ry. Co., 43 Minn. 223; 45 N. W. 157.

In Tullis v. Lake Erie & Western Railroad, 175 U. S. 348, an act of Indiana abolished the fellow servant doctrine as applied to railroads and other corporations, except municipal corporations. The Supreme Court of Indiana held that the act was valid as applied to railroads, but capable of severance; and as the complaining corporation was a railroad company it was held that it would not be heard. (Ry. Co. v. Montgomery, 152 Ind. 1.) This court only considered the statute as construed by the Supreme Court of Indiana, as applicable to railroad companies only, and its constitutionality was upheld. The exception in favor of municipal corporations was held to be a proper classification for obvious reasons.

In Minnesota Iron Co. v. Kline, 199 U. S. 593, the statute under consideration abrogated the fellow servant doctrine as applied to all railroads except those in course of construction. The Supreme Court of Minnesota held that the plaintiff in error was a railroad, and this court, of course, accepted that view. It was said by Justice Holmes in that case that there was no objection to legislation being limited to a peculiar and well defined peril.

In Farmers, etc., Ins. Co. v. Dabney, 189 U. S. 391, it was held that a statute allowing attorney's fees to be

taxed against the defendant in suits on insurance policies was valid, Justice White stating that insurance companies were a proper subject for classification. In this case Justices Harland, Brewer and Brown dissented on the ground that there was no proper classification, but this was the only point of disagreement between the majority and minority of the court.

In Minneapolis & St. Louis Ry. Co. v. Emmons, 149 U. S. 364, the validity of a statute of Minnesota requiring railroads to fence their tracks, was sustained as a proper classification.

In St. L., I. M. & S. Ry. Co. v. Paul, 173 U. S. 404, an Arkansas statute required that railroad companies should pay their employees promptly on their discharge or be subjected to certain penalties. The statute was held to be constitutional on the ground of a proper classification under the reserved power to alter and amend charters, the court saying (p. 408):

> "As this amendment rested in reasons deduced from the peculiar character of the business of the corporations affected and the public nature of their functions and applied to *all alike*, the equal protection of the law was not denied."

In Chicago & N. W. R. R. Co. v. McLaughlin, 119 U. S. 566, the question before this court was the constitutionality of an act abolishing the fellow servant doctrine as applied to railroad companies. The judgment was affirmed by a divided court. This, of course, was an instance of proper classification.

In Missouri Ry. Co. v. Mackey, 127 U. S. 205, the statute abolishing the fellow servant doctrine applied only to railroads, and was sustained, the court taking occasion to say that the hazardous character of the business of railroading justified the classification.

In Chicago Ry. Co. v. Pontius, 157 U. S. 209, the statute of Kansas construed in Mo. Ry. Co. v. Mackey, *supra*, was involved, it having been extended by construction to an incidental employment by a railway company. The court reiterated the reasons for the classification, and held that it was proper to sustain the judgment.

In the case of Hammond Packing Co. v. Arkansas, 212 U. S. 322, the point involved was that the relief prayed —the production of corporate books—would violate the equal protection clause (335) and that the action would be an unreasonable search and seizure. In previous decisions this court had held that corporations could be properly classified and charged with the duties of making reports and permitting their books to be inspected. This distinction was held to furnish a real basis for classification.

In the case now before the court there is no excuse of classification for special legislation except that under the power to alter and amend charters the State may impose any condition whatever upon corporations, even though this condition involves the surrender of rights guaranteed by the Constitution and laws of the United States. In the case first before the Supreme Court of Arkansas, wherein the

constitutionality of this act was assailed, the defendant and appellant was a saw mill corporation. No difference between its affairs, properties and business and those of an individual or partnership conducting an exactly similar saw mill could be imagined, and the court sustained the statute solely upon the right of the State to deal as it saw fit with corporations. In the case now before this court no condition of hazards, business or circumstances, under which plaintiff in error operated its affairs, would be different from a similar business conducted by individuals and partnerships. The classification that all corporations should be liable, and individuals and partnerships in the same situation should not be liable, is absolutely arbitrary. The statute cannot be sustained by the argument that it is equal because it applies to all corporations equally. The equality of circumstances, conditions and business exist between many corporations, individuals and partnerships. It could as well be said that the State could suspend the operation of the United States Constitution and all its laws as to all corporations, and that the legislation would be equal because it applied to all corporations.

In Ozan Lumber Company v. Biddie, 87 Ark. 587, where the statute now before the court was first considered by the Supreme Court of Arkansas, the opinion seems to indicate that the power of the State to deal with corporations was unlimited, except that the legislation should be "just and reasonable." No ground of classification of the corporation affected by the statute is advanced. On page

593 of the opinion the policy of the law, as between employer and employee, is commented on, but no reason is advanced why the law should apply to corporations only and not to individuals and partnerships under precisely similar conditions and circumstances. The court evidently considered that the power to alter and amend charters was unlimited unless limited by some contractual right. No distinction can be observed between a limitation because of contractual right when the integrity of the right is upheld only by the Constitution of the United States and the limitation existing by virtue of other provisions of the Federal Constitution.

The power to alter and amend charters must always be considered with reference to the provisions of the Federal Constitution and laws, and the form of the amendment will not be allowed to impair a right guaranteed by the Constitution of the United States.

W. U. Tel. Co. v. Kansas, decided January 17, 1910.

The motion in this case is to affirm it on the ground that the Federal question involved is frivolous, but we respectfully urge that it is most important, and that the contention of plaintiff in error should be sustained.

Respectfully submitted,

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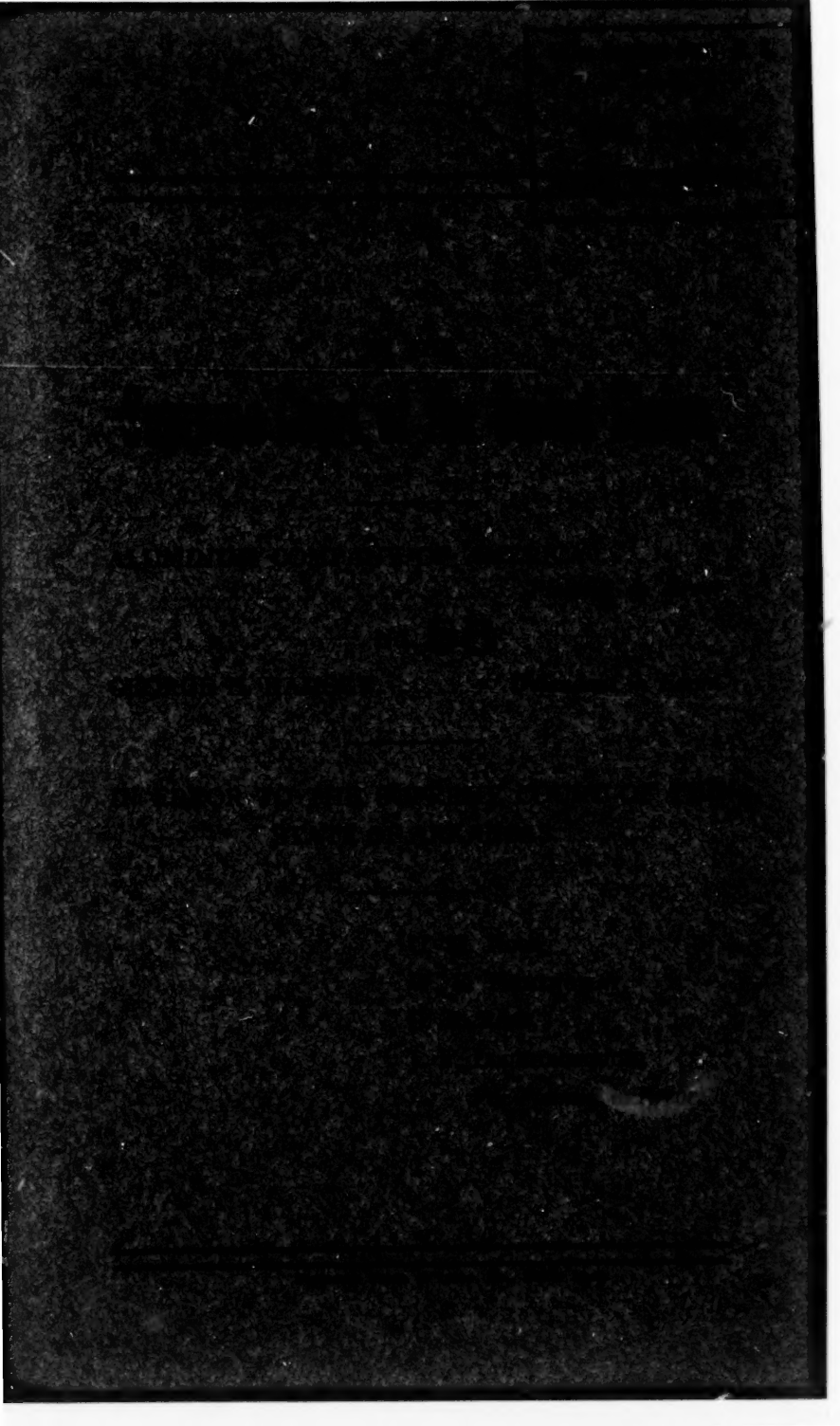

IN THE

Supreme Court of the United States

ALUMINUM COMPANY OF AMERICA.....
.....*Plaintiff in Error*

v. No. 228.

GEORGE H. RAMSEY.....*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

This writ of error presents the question whether the act of the Legislature of Arkansas abolishing the fellow servant doctrine as to all corporations engaged in whatever business, leaving the doctrine in force as applied to all others but corporations, is constitutional under the Fourteenth Amendment to the Constitution of the United States.

The Aluminum Company of America is a corporation organized under the laws of Pennsylvania, and is and was doing business in Arkansas as a foreign corporation long

prior to March 8, 1907, the date of the enactment of the act of the Legislature abolishing the fellow servant doctrine in Arkansas (Tr. 1, 127). It operated a mill at Bauxite, in Saline County, Arkansas, which conducted a process in the reduction of bauxite to aluminum. Bauxite is a clay-appearing earth, and is taken from the ground in surface mines. For a time it was hauled to the mill in wagons, but afterwards a tramroad was installed which conveyed the bauxite from the places where it was dug to the mill (Tr. 61). This tramroad did not haul passengers or freight for the public (Tr. 81), but was merely used for the purpose of bringing the bauxite from the adjacent places where it was dug, to the mill. The greatest length of any of its track was about 2,800 feet (Tr. 61). The rails of this tramroad were light, weighing about 25 pounds, whereas the rails of an ordinary railroad weight between 69 and 90 pounds (Tr. 64). The rails were set about three and one-half feet apart (Tr. 64). The tram cars were small affairs, being nine and one-half feet long and four feet wide (Tr. 65, 67), and would haul about two tons of earth. These trams cars were moved about on the rails by a small "dinky" steam locomotive, and were also pushed along the rails by the men loading and unloading bauxite earth (Tr. 61, 63).

On June 18, 1907, defendant in error was in the employ of plaintiffs in error, and operated the "dinky" engine which we have described.

Associated with him in the operation of his engine and such tram cars as it might handle was an employee of plain-

tiff in error, who rode on the cars, set the brakes and threw switches as needed, from time to time (Tr. 53), and also associated with him were other employees of plaintiff in error, who worked about the mill and who would turn the switch for tram cars to be diverted from the track on which the engine ran and pushed into the mill (Tr. 54), the employees turning the switch and also pushing the cars into the mill for unloading (Tr. 63). One of these latter employees was named Bob Page. The relations between all the employees we have described were those of fellow servants under the common law as it existed in Arkansas prior to the act of the Legislature of 1907, and as it existed in Arkansas after that date as to all others except those for whom the act of 1907 abolished the fellow servant doctrine. On June 18, 1907, defendant in error was bringing about eight tram cars of bauxite dirt to the mill; and, as it approached the switch leading from the main tram track to the mill, defendant in error endeavored to execute what is known as a "flying switch." His engine was in front of the tram cars and as he approached the switch he uncoupled it from the tram cars, increased its speed suddenly, and passed the switch on the main track, expecting that it would be turned before the cars reached it and the cars diverted to the mill (Tr. 18). The testimony of defendant in error showed that after he had passed the switch with his engine about 50 feet, he stopped it, got out behind the engine with his back to the cars following, and standing on the ground began attending to his fire without noticing whether the cars took the switch (Tr. 28). The tes-

timony of defendant in error was that he observed Page at the switch before the engine passed and that Page had time to turn it after the engine passed and before the cars reached it (Tr. 18). The testimony of Page and some others was that Page had not reached the switch when the engine passed (Tr. 39). The tram cars followed the engine and caught defendant in error between the engine and cars, crushing his leg so that it had to be amputated (Tr. 18, 36). He brought suit against the plaintiff in error, in the Saline Circuit Court, alleging that the conduct of Page in not turning the switch was negligence for which plaintiff in error was chargeable (Tr. 1). The case was tried before a jury, and a verdict rendered for defendant in error in the sum of $20,320.00 (Tr. 12). The plaintiff in error appealed to the Supreme Court of Arkansas, where the judgment was affirmed on condition that defendant in error enter a remittitur of all in excess of $12,000.00. The remittitur was entered, and judgment for $12,000.00 was rendered by the Supreme Court of Arkansas (Tr. 147).

Plaintiff in error presented at the trial the question of the unconstitutionality of the act of the Legislature of Arkansas abolishing the fellow servant doctrine, by requests for a peremptory instruction and for a specific instruction that the said act of the Legislature denied the plaintiff in error the equal protection of the law (Instruction No. 27, p. 127).

The point that the act of the Legislature was in violation of the equal protection and due process clauses of the

Federal Constitution, was urged upon the Supreme Court of Arkansas, and by it decided adversely to the contention of plaintiff in error. The decision of the Supreme Court of Arkansas was that the act was constitutional in its entirety. The act was construed by this court, and applied to all corporations of every kind and character, in whatever business engaged (Tr. 135, 147). At the trial the defendant in error requested an instruction embodying the principle that the master was liable to each of his servants for the negligence of any other of his servants, and this instruction was given over the objection of the plaintiff in error (Instruction No. 1, p. 120).

Plaintiff in error asked instructions embodying the principle that it was not a railroad company within the meaning of the act, and also asked an instruction submitting to the jury that if they found that plaintiff in error was a foreign corporation incorporated for manufacturing purposes and doing business in Arkansas as a foreign corporation and had a plant in this State for the purpose of mining and drying bauxite, and in connection with its plant had a tramway leading from the mines to the drying plant and that said tramway did not carry freight or passengers for the public nor propose to do so, and was not incorporated for that purpose or operated as a railroad or railway company, the expression "railroad companies operating within this State, whether incorporated or not," used in the act of the Legislature of 1907, approved March 8, 1907, would not apply to the operation of the defendant's tramway.

This instruction was refused (Tr. 127) on the ground that the act applied to all corporations.

An instruction was asked that plaintiff in error was not a railway company within the provisions of the prior act of the Legislature, approved February 28, 1893, defining who were fellow servants in railway companies, but on the concession of defendant in error that plaintiff in error was not a railway company within that act, the instruction was withdrawn (Tr. 128).

The Supreme Court of Arkansas had held previous to its decision in this case that the act of 1907, abolishing the fellow servant doctrine in Arkansas as to all corporations, was constitutional as to all corporations, saying in the opinion in the present case:

> "The act of our Legislature, approved March 8, 1907, which abolishes in this State the common law rule that a servant assumes the risk of negligence of his fellow servant, has been sustained by this court in the case of Ozan Lumber Co. v. Biddie (87 Ark. 587), decided since the trial of this case in the court below. Hence, it is not necessary to notice the refusal to give these instructions which were asked by the appellant and which were based upon the unconstitutionality of that act, except to say that the opinion in the case of the Ozan Lumber Co. v. Biddie is in accord with the modern text writers on the subject and as well the great majority of adjudicated cases."

The case of Ozan Lumber Co. v. Biddie, *supra*, arose on the claim by appellee on account of injuries sustained by him while at work in a sawmill, and his recovery of a verdict was sustained on the ground that the act of 1907 abolishing the fellow servant doctrine was constitutional as

applied to sawmills and all other corporations. In that case the court based its holding upon the theory that under the reserved power of the State of Arkansas to alter and amend charters of corporations, it could validly pass the act in question.

ASSIGNMENT OF ERRORS.

And now comes the Aluminum Company of America, plaintiff in error, and says that in the record aforesaid there is manifest error, and it hereby states that the errors therein which it intends to rely on at the hearing are as follows, towit:

1. The Supreme Court of Arkansas erred in holding and deciding that the act of the Legislature of the State of Arkansas, approved March 8, 1907, and entitled "An Act to give right of action against an employer for injuries or death resulting to his agents, employees or servants, either from the employer's negligence or from the negligence of some of his other employees, servants or agents, and to repeal all acts and parts of acts in conflict herewith," was not repugnant to the Fourteenth Amendment to the Constitution of the United States and that the judgment of the Saline Circuit Court in this cause did not deny plaintiff in error equal protection of the law.

2. The Supreme Court of Arkansas erred in holding and deciding that the act of the Legislature of the State of Arkansas, approved March 8, 1907, and entitled "An Act to give right of action against an employer for injuries

or death resulting to his agents, employees or servants, either from the employer's negligence or from the negligence of some of his other employees, servants or agents, and to repeal all acts and parts of acts in conflict herewith," was not repugnant to the Fourteenth Amendment to the Constitution of the United States, and that the judgment of the Saline Circuit Court in this cause did not deprive plaintiff in error of its property without due process of law, in violation of said amendment.

BRIEF OF ARGUMENT.

Prior to March 8, 1907, the common law rule of the liability of a master for injury to one of its servants by the negligence of another, except in the instances of railroad companies, was in force, and there was no liability imposed upon masters for injuries occasioned by the acts of fellow servants.

Kenefick-Hammond Co. v. Rohr, 77 Ark. 290.

In the year 1893 the rule was restricted as to railway companies, the act appearing as follows in Kirby's Digest of the Statutes of Arkansas (secs. 6658, 6659):

> "Sec. 6658. All persons engaged in the service of any railway corporations, foreign or domestic, doing business in this State, who are entrusted by such corporation with the authority of superintendence, control or command of other persons in the employ of service of such corporation, or with the authority to direct any other employee, in the performance of any duty of such employee, are vice-principals of such corporation, and are not fellow servants with such employee.

"Sec. 6659. All persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being intrusted by such corporation with any superintendence or control over their fellow employees, are fellow servants with each other; provided, nothing herein contained shall be so construed as to make employees of such corporation in the service of such corporation fellow servants with other employees of such corporation engaged in any other department or within the provisions of this section shall not be considered fellow servants."

The act of 1907, the constitutionality of which is assailed on this appeal, appears at page 162 of the acts of that session, and is as follows:

"An Act to give right of action against an employer for injuries or death resulting to his agents, employees or servants, either from the employer's negligence or from the negligence of some of his other employees, servants or agents, and to repeal all acts and parts of acts in conflict herewith.

"Be It Enacted by the General Assembly of the State of Arkansas:

"Section 1. That hereafter all railroad companies operating within this State, whether incorporated or not, and all corporations of every kind and character, and company, whether incorporated or not, engaged in the mining of coal, who may employ agents, servants or employees, such agents, servants or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee or servant,

resulting from the careless omission of duty or negligence of such employer, or which may result from the carelessness, omission of duty or negligence of any other agent, servant or employee of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer.

"Section 2. That all laws and parts of laws in conflict herewith are hereby repealed and that this act shall take effect and be in full force from and after its passage.

"Approved March 8, 1907."

It will doubtless be readily conceded by counsel for defendant in error that defendant in error would only be entitled to recover in this case under the said act of the Legislature of Arkansas of 1907, and without that act his employment and duties would be deemed within the rule of the fellow servant doctrine as applied by the courts in Arkansas and of the United States, and he would have no right to recover.

There are three questions for consideration by this court: First, whether the act of 1907, abolishing the fellow servant doctrine as to all corporations, is constitutional; and, second, is defendant in error a railroad company within the provisions of that act; third, if defendant in error is a railroad company, is the act separable so that the features of it that are constitutional will be sustained and its unconstitutional features eliminated?

ACT OF 1907 UNCONSTITUTIONAL.

We respectfully insist that the act of 1907 is in violation of the Fourteenth Amendment to the Constitution of the United States because it denies to plaintiff in error the equal protection of the laws, and deprives it of its property without due process of law.

As we mentioned in our statement of the case, the only construction put upon the act of the Legislature now before this court by the Supreme Court of Arkansas was that the act was constitutional in its entirety. This sufficiently appears from the opinion in the present case, and it conclusively appears from the opinions in other cases before the Supreme Court of Arkansas where this act was involved. In Ozan Lumber Co. v. Biddie, 87 Ark. 587, a recovery by an employee of a sawmill corporation under the act of 1907 was sustained, and in Soard v. Western Anthracite Coal & Mining Co., 92 Ark. 502, the argument was made that the act only applied to railroad companies and companies engaged in mining coal, and that the defendant in that case was not engaged in mining coal within the meaning of the act. In disposing of this argument, the Supreme Court of Arkansas said:

> "It is unnecessary to determine whether or not appellee was engaged in mining coal within the meaning of the statute in question as it is a corporation, and the statute applies to all corporations without regard to the particular business in which they are engaged."

We respectfully insist that the act is unconstitutional because it imposes obligations upon corporations without

regard to the class of business in which they are engaged, and in a matter where the classification of corporations is not authorized because of the nature of their entity. We urge that the act, in imposing these obligations upon all corporations, is clearly without reason for such classification and is purely arbitrary. We insist that as individuals and partnerships can engage in any business that corporations engage in, and do engage in all business that corporations engage in, the act in question imposes upon individuals and partnerships one rule of liability for injury to their employees and imposes upon corporations engaged in exactly the same situation as such individuals and partnerships a different and more onerous rule of liability to their employees. In attempting to create this situation, the act of the Legislature of 1907 denies to corporations and to this plaintiff in error the equal protection of the law.

Corporations are persons within the Fourteenth Amendment to the Federal Constitution, and are entitled to all the protection of this amendment.

> Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S. 154.
>
> Santa Clara County v. Southern Pacific Ry., 118 U. S. 394.

In Gulf, Colorado & Santa Fe Ry. v. Ellis, *supra*, the court said:

> "The rights and securities guaranteed to persons by that instrument (the Constitution) cannot be disregarded in respect to these artificial entities called

corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

In Minneapolis Ry. Co. v. Beckwith, 129 U. S. 29, the court said:

"Equality of protection implies not merely accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind."

This court has consistently held from the beginning of its decisions involving this question that equal protection of the laws did not mean that the same law should apply to everyone; that different conditions require and authorize different laws, and that special legislation was not therefore unequal. The court has as consistently held that wherever there is special legislation, the warrant for it must be found in differing situations; that classification of subjects for special legislation shall not be arbitrary and without reason, but must rest upon some real basis of classification.

In Gulf, Colorado & Santa Fe Ry. v. Ellis, *supra*, on this point it is said that classification "must always rest upon some difference which bears some reasonable and just relation to the act to which the classification is proposed, and can never be made arbitrarily and without any such basis." And in this case, on page 158 of the opinion, Mr. Justice Brewer said:

"And any classification for the imposition of such special duties—duties arisng out of the peculiar busi-

ness in which they are engaged—is a just classification and not one within the prohibition of the Fourteenth Amendment."

And in discussing the importance and realness of this classification, on page 165, he continues:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

There were dissents to the judgment in this case, but the dissents were upon the ground that the classification in the particular case was not arbitrary.

Noticing the insistence with which the court has adhered to this construction of the Fourteenth Amendment, we direct attention to the following cases:

In Barbier v. Connolly, 113 U. S. 27, it is said:

> "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In Soon Hing v. Crowley, 113 U. S. 709, it is said:

> "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions."

In Missouri v. Lewis, 101 U. S. 30, in speaking of the right of the equal administration of the laws, it is said:

> "The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount or finality of decision, if all persons within the territorial limits of the respective jurisdictions have an equal right, in like cases, and under like circumstances, to resort to them for redress."

In Hays v. Missouri, 120 U. S. 68, it is said (p. 71):

> "It (the Fourteenth Amendment) merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed."

In Duncan v. Missouri, 152 U. S. 377, on page 382, it is said:

> "The equal protection of the laws is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of the government."

In Lowe v. Kansas, 163 U. S., on page 88 it is said;

> "As the statute is applicable to all persons under like circumstances, and does not subject the individual to an arbitrary exercise of power, it has not denied him the equal protection of the laws."

In Jones v. Brim, 165 U. S. 184, it is said:

> "The statute being general in its application, embracing all persons under substantially like circumstances, and not being an arbitrary exercise of power, does not deny to the defendant the equal protection of the laws."

See also the following:

N. Y., etc. Ry. v. New York, 165 U. S. 633.

Cargill Co. v. Minnesota, 180 U. S. 469.

Chicago, etc. R. R. Co. v. Pontius, 157 U. S. 211.

Atchison, T. & S. F. Ry. v. Matthews, 174 U. S. 96.

St. L. S. F. Ry. Co. v. Matthews, 165, U. S. 1.

Field v. Barber Asphalt Co., 194 U. S. 618.

See also the recent decision in—

Southern Ry. Co. v. Green, 216 U. S. 400, 412, 417.

In Cotting v. Kansas City Stock Yards, 183 U. S. 112, the classification made by the Legislature there considered was held to be arbitrary because not applying to all under similar circumstances and conditions.

In Connolly v. Union Sewer Pipe Co., 184 U. S. 540, the classification under the Illinois anti-trust statute was held to be arbitrary because farmers and stock raisers were excluded from its provisions. In deciding this point, Mr. Justice Harlan, after reviewing the previous decision of this court, said (p. 160):

> "The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reason-

able and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' "

Citations on this point in our argument could be multiplied, but we take it that the principle is so well settled as to merit no further discussion.

In the nature of things, a wide discretion in the matter of classification must be vested in the State, and this court has always held that if the classification is observed to rest upon any real basis or difference in circumstances or conditions, and is not merely arbitrary, it will be sustained.

In Orient Ins. Co. v. Daggs, 172 U. S. 562, in announcing this principle, the court said:

> "Classification for such purposes is not invalid because not depending on scientific or marked differences in things, or persons, or their relations. It suffices, if it is practical, and is not reviewable unless palpably arbitrary."

These observations were made upon the classification of different kinds of insurance companies, which from the nature of their respective businesses, clearly indicated a difference in circumstances and conditions.

In District of Columbia v. Brooke, 214 U. S. 138, on

logically appropriate or scientifically accurate. * * * A wide

make it practical, and we have often said that the courts

"Passing on that amendment, we have repeatedly decided—so often that a citation of the cases is unnecessary—that it does not take from the States the power of classifica-

tion, and also that such classification need not be either logically appropriate or scientifically accurate. * * * A wide range of discretion therefore is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws."

On the other hand, there has been no hesitation on the part of this court in applying the provisions of the Fourteenth Amendment where occasion for such application has arisen, and this court has very strongly insisted that in whatever guise legislation may be couched, if its practical effect and operation is to deny the equal protection of the law, the court will disregard fancied refinements and will uphold the supremacy of the United States Constitution by giving it a sensible and practical operation.

In Brimmer v. Rebman, 138 U. S. 78, at page 81, the court said:

> "Is the statute now before us liable to the objection that by its *necessary operation* it interferes with the enjoyment of rights granted or secured by the Constitution? This question admits of but one answer."

In Mugler v. Kansas, 123 U. S. 623, on page 661, this court said:

> "The courts are not bound by *mere forms* nor are they to be misled by mere pretenses. They are at liberty, indeed are under the solemn duty, to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority."

In the light of these principles, the validity of the act of the Legislature of Arkansas drawn in question by this writ of error is to be considered.

Plaintiff in error was in the manufacturing business and had employees in the furtherance of its business. It was in the same business that any individual or collection of individuals could embark in, and doubtless many individuals were engaged in such business. There were no peculiar hazards of its business that were sought to be regulated by the act in question, but merely because it was a corporation the act sought to impose this unequal burden upon it. No one will seriously assert that a corporation conducts its business in any different manner than would individuals conduct an exactly similar business. Suppose a partnership was engaged in exactly the same business as plaintiff in error, employing the same number of men, engaged in precisely the same work (by no means an unauthorized assumption), and one of them had been injured under exactly the same circumstances as defendant in error was injured. Is there equality before the law in saying that the corporation would be liable for such injury while the partnership would not be liable? The reason assigned for this classification does not depend upon any difference in circumstances or conditions, but is purely arbitrary.

In Ballard v. Mississippi Cotton Oil Co., 81 Miss. 557, 34 Sou. 533, a law abolishing the fellow servant doctrine in Mississippi was effective to the same extent as was this; that is, it applied to all corporations and did not apply to

individuals or partnerships. In this case the validity of the act was attacked as being opposed to the equality clause of the Fourteenth Amendment. The opinion shows that the case was thoroughly and well considered, and in holding that the act was unconstitutional the court said:

> "Our conclusion after the most careful and protracted consideration is that section 1 of the act of 1898 violates the Fourteenth Amendment to the Constitution of the United States in that it imposes restrictions on all corporations without reference to any differences arising out of the natures of their businesses, which are not imposed upon natural persons, and thus denies to corporations the equal protection of the law."

The Supreme Court of Arkansas sustained the validity of this act because the court considered that the State could do as it saw fit with corporations if it reserved the right to alter and amend their charters. If this proposition is true, then it would necessarily follow that the States could suspend the operation of each and every clause of the Federal Constitution, so far as corporations were concerned, if they reserved the power to alter or amend their charters. The necessary effect of this would be to place it in the power of the States to withhold from corporations the provisions of the Federal Constitution. It must be true that if corporations are within the provisions of the Fourteenth Amendment, then no act of the State can deprive them of the guaranties given in this amendment. To say that the State could withhold the rights guaranteed by the Fourteenth amendment from a corporation merely because they adopted the form of amending their charters, would place it in the

power of the States to abrogate the Constitution of the United States as to corporations if they pursue a certain form in their legislation—a principle that was rejected by this court as soon as presented. The power of the States to deal with corporations in any form of legislation or under any reserved power, must always be exercised consistently with the integrity and supremacy of the Constitution and laws of the United States. This principle does not exist alone because of the harm that may be done the corporations, but was announced because of the dignity and supremacy of the Constitution and laws of the United States. If the State reserves the power to alter and amend charters of corporations, and can do this without limit, as was indicated to be the opinion of the Supreme Court of Arkansas in this case, the corporations are then without these laws and entitled to none of their protection. It naturally follows that if the equal protection of the laws as to particular liabilities may be denied by the States in the form of amending the charters of corporations, the entire scope of the Fourteenth Amendment may be denied; and if the equality of laws could be denied, the due process clause could also be denied, the right of removal to the Federal Court could be denied; any proceedings for the proof of claims by corporations under the bankruptcy act could be denied; they could be subject to *unreasonable* searches and seizures; the obligation of their contracts could be impaired; they could be prohibited from using the United States mails or from engaging in interstate commerce, or from doing business with nationai banks, and there would exist a large

class of business operations in the State or several States that would be without the pale of the United States Constitution and the laws thereunder, because a form invented by the State had deprived them of the right. If it is unlawful for a State to say that a corporation shall not be entitled to the equal protection of the law, then it is unlawful for the State to withhold from the corporation the equal protection of the laws. In the one case it is forbidden, and in the other forcibly withheld. It is inoperative in either. There is a difference in prohibiting the formation of corporations or their admission to the State, and forming them or admitting them upon the condition that they surrender rights guaranteed under the Constitution. The first does not violate the supreme law; the other does. There is a legal as well as a moral difference between prohibiting a man from coming into your house, and admitting him only on condition that he renounce his rights to the protection of the law.

It is of course true that the State may enact very many laws that apply only to corporations and do not apply to individuals separately or collectively, and these laws will be sustained under the United States Constitution. The nature of the entity of a corporation and many other distinguishing features properly require classification of many of its affairs and operations. The conduct of corporate organization, elections, appointment of officers, the appointment of agents for service of process, the payment of license fees, taxes on the franchise, publicity of their affairs, lia-

bility on stock subscriptions, and very many other features subject corporations to classification for special legislation, but none of these features are present and authorize the legislation in this case. The situation of corporations and the situation of individuals and partnerships under the act are exactly alike, but the statute imposes an arbitrary classification and a difference in liabilities between the two that is not authorized by any semblance of difference in their affairs.

It is well settled that the State may impose terms upon corporations of its own creation at the time they are created, or subsequent thereto, unless some contract obligations to the contrary are created by the act of the incorporation; and so it may admit foreign corporations to do business in the State on terms, and may absolutely prohibit foreign corporations from doing business in the State. The terms imposed upon corporations, either domestic or foreign, in the absence of contract rights will not be inquired into by the courts unless these terms are such as to conflict with the Constitution and laws of the United States. Where the States attempt to enact unequal laws relating to corporations under whatever form the legislation may be, the legislation can only be sustained on the ground of reasonable classification and will never be sustained if the classification is arbitrary. With consistency and precision this court has always taken occasion to remark that the terms imposed by the State must be such as not to conflict with the Constitution and laws of the United States. It requires

no specious argument to show that a contrary doctrine would put it in the power of the State to remove corporations absolutely from the protection of the Constitution of the United States.

In Ducat v. Chicago, 10 Wall. 415, it is said: "The power of the State to discriminate between her domestic corporations and those of other States desirous of transacting business in her jurisdiction is clearly established in the case we have referred to (Paul v. Vilginia), as it also had been in the previous case of Augusta v. Earle. As to the nature or degree of discrimination it belongs to the State to determine, subject only *to such limitations on her sovereignty as may be found in the fundamental law of the Union.*"

In Lafayette Ins. Co. v. French, 18 How. p. 407, the court said:

> "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, *provided they are not repugnant to the Constitution or laws of the United States,* or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

In Duluth & Iron Range R. R. Co. v. St. Louis Co., 179 U. S. 302, Mr. Justice White said (p. 305):

"For this reason, we conclude that the act which it is asserted repealed or amended the contract (charter) was void because a mere arbitrary exercise of power, giving rise, if enforced, not only to a denial of the equal protection of the laws, but to a deprivation of property without due process of law."

Congress has seen fit to pass laws authorizing citizens of different States in certain situations to remove cases to the Federal Court, and within this description of citizenship are corporations, and corporations have the right to bring suits to the Federal Court or to remove them thereto the same as individuals. In the natural reaching out for an extension of power that is a human element in all States, legislation was enacted by some of the States seeking to restrict the rights given to corporations by Congress to institute suits in the Federal Courts and remove them thereto, and acts were passed whereby it was provided that if foreign corporations invoked the jurisdiction of the Federal Courts under the act of Congress, they should be denied the right of doing business in the State.

In Ins. Co. v. Morse, 20 Wall. 445 (decided in 1874) the validity of a statute of the State of Wisconsin was questioned. The statute provided that any insurance company seeking to do business in the State should enter into an agreement that it would not remove a suit to the Federal Court. In defense of the statute it was argued that as the State had the right to prohibit a corporation from doing business within its borders it might do anything less than this by imposing terms upon a corporation seeking to do business in the State, and the terms imposed were a valid ex-

ercise of the State's power in the premises. It will be noted that in this case the corporation involved was an insurance company, and no question of interstate commerce, violation of contract right, or deprivation of property without process of law, was involved. The only question involved was within what limits is confined the right of the State to impose terms upon corporations? It was held that this right did not extend to the taking away of rights conferred by valid legislation of Congress. This holding was on the broad ground that a contrary doctrine would impair the sovereignty and dignity of the supreme law of the land. In disposing of the case, Mr. Justice Hunt said:

> "A man may not barter away his life or his freedom or his substantial rights. * * * A corporation has the same right to the protection of the laws as a natural citizen and the same right to appeal to all the courts of the country. The rights of an individual are not superior in this respect to that of a corporation. * * * The State of Wisconsin can regulate its own corporations and the affairs of its own citizens, in subordination, however, to the Constitution of the United States."

In construing the authority of Paul v. Virginia and Bank of Augusta v. Earle, and after remarking on the broad language used in these cases of the power of the States over corporations, the court further said (p. 457):

> "None of the cases so much as intimate that conditions may be imposed which are repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by others."

We are unable to perceive any reason why this case is not in point with the case now before the court and author-

ity for the proposition for which we contend. In that case there was an agreement not to resort to the Federal Court, and the court held that the agreement was void.

In Barron v. Burnside, 121 U. S. 186, an employee of a foreign corporation was arrested for doing the business of the corporation in the State when the corporation had not filed a stipulation required by statute agreeing not to remove cases to the Federal Court. The court held the statute unconstitutional, saying (p. 200):

> "As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

In the Morse case an agreement made by the corporation waived a right conferred by Federal laws. In the Burnsides case, the agreement was not made by the corporation, but one of its employees was arrested because the corporation violated the statute requiring the agreement surrendering rights extended by the Federal law. The court held the statute invalid. In our opinion these cases are directly in point with the question now before the court and are authority for our contention. If the State could not enforce an agreement waiving a right to remove to the Federal Court, and could not pass a valid statute surrendering this right, could the State enforce an agreement waiving the equal protection of the laws, or would a statute requiring that such agreement be made be constitutional? Obviously the State would have no power to do either. If

the State could not secure a valid agreement waiving the equal protection of the law and could not uphold a statute requiring such agreement, certainly it could not deny the equal protection of the law and defend its action only because it had the right to impose terms upon corporations. The right to the equal protection of the laws as to corporations is certainly not less important than the right to remove to the Federal Court, but on the contrary it is much more important. Certainly the dignity of the act of Congress authorizing the removal to the Federal Court is not greater than the constitutional provision guaranteeing the equal protection of the law. There is a limit to the terms that can be imposed by the States on corporations and that limit is reached when the operation of the enactment would conflict with the supreme law of the land. No matter of form or complexity of legislative enactments can be invented by the States where the condition created by such legislation operates to impair or render dormant the Constitution and laws of the United States.

In Doyle v. Continental Ins. Co., 94 U. S. 540, the license of a foreign corporation was revoked because it removed a suit to the Federal Court after stipulating that it would not do so as a ground upon which it should be entitled to do business in the State. The court held the revocation valid and approved the holding in Ins. Co. v. Morse, *supra*, distinguishing that situation from the Morse case on the ground that the State had the right to prohibit the corporation from doing business within its borders and could exercise this right for any reason it saw fit, or with-

out reason. That the question before the court was not the question involved in the Morse case, but was a question whether the court would inquire into the reasons why the State prohibited foreign corporations from doing business within its territory.

The principle announced in the Morse cases, and which we conceive to be the same that we contend for now, was considered by the court in the Doyle case, and its soundness affirmed, the court saying (p. 542):

> "No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State is infringed; and *this is what the State now accomplishes.*"

In this case Justices Bradley, Swayne and Miller dissented on the ground that the effect of the action by the State, while expressed to be merely an excluding of the corporation, was really excluding it because it did not surrender a right guaranteed under the laws of the United States, and that this method of accomplishing what was prohibited should not be permitted. We quote the following from the dissenting opinion (p. 543):

> "Though a State may have the power, if it sees fit, to subject its citizens to the inconvenience of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffering and many manifest a spirit of unfriendliness towards sister States; but prohibition, except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mischievous, and productive of hostility to the general government. If a State is unwise enough to legislate the

one, it has no constitutional power to legislate the other."

Had the case now before the court been one where the State had refused to grant a license to corporations seeking to do business in the State unless they filed a stipulation waiving the equal protection of the laws, the Doyle case would be an authority perhaps. But this case did not impair, but on the contrary expressly reiterated, the authority of the Morse case in situations where the State was not seeking to revoke the license or refuse to grant a license to a corporation, but was seeking to impose terms upon the corporation, the terms being in conflict with the Constitution and laws of the United States.

In Security Ins. Co. v. Prewitt, 202 U. S. 246, the distinction is further recognized and the decisions in Barron v. Burnsides and Ins. Co. v. Morse are approved, as is also the decision in Doyle v. Continental Ins. Co., the court being of the opinion that the Prewitt case was like the Doyle case. This case was like the Doyle case in that the issue arose upon the contention by the corporation that it could not be *ousted from doing business in the State*. The question was then whether the courts would inquire into the reasons for the action of the State in ousting the corporation. A majority of the court were of the opinion that these reasons would not be inquired into, but the distinction in the situation in these cases and in the Morse and Burnsides cases, was recognized. The dissenting opinions of Justices Harlan and Day in this case are worthy of note

in the application of their arguments to the situation now before the court. On page 266 they said:

> "If a State may lawfully withhold the right of transacting business within its borders or exclude foreign corporations from the State upon the condition that they shall surrender a constitution right given in the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the State from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the State may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the State to exclude, includes the right, when exercised for any reason or for no reason, the State may say to the foreign corporation, You may do business within this State, provided you will yield all right to be protected against deprivation of property without due process of law; or provided you surrender your right to have compensation for your property when taken for private use; or *provided you surrender all right to the equal protection of laws;* and so on through the category of rights secured by the Constitution and deemed essential to the protection of people and corporations living under our institutions."

Whatever may have been the ground of difference between the majority and minority in this case, we think no one can properly deny the application of this argument to the case now before the court. This is not a case where the State seeks to revoke a license and the court is asked to inquire into the reasons that actuated the State; but this is a case where all of the imagined evils mentioned by Justices Harland and Day have become a reality, and the State has sought to withhold from corporations the equal protec-

tion of the law, and legislation to this effect has been sustained by the highest court in the State on the ground that the State has the right to withhold from corporations the equal protection of the law because of its reserved right to alter or amend their charters. That the States have no right, under whatever form, to interfere with interstate commerce, when conducted by a corporation, has been so frequently and uniformly decided by this court that a discussion of cases involving this well settled principle would be inexcusable. It would hardly be contended in any court that a State, as a condition of a foreign corporation doing business within it, could impose terms upon it that would involve a surrender of its right to engage in interstate commerce; but where is the difference in legislation that would accomplish this purpose and legislation that would require the surrender of rights under the equality clause or other provisions of the Constitution?

In W. U. Tel. Co. v. Kansas, 216 U. S. 1, the State of Kansas imposed a tax upon the interstate business of the telegraph company as a condition upon which the corporation should be permitted to do intrastate business. The court held that this legislation was unconstitutional, reiterating the principle announced in all the previous decisions affecting this point, that while the State could impose terms, it could not impose terms that would impair the sovereignty and integrity of the Constitution and laws of the United States. In holding that the effort of the State of Kansas to burden interstate commerce under the guise of providing

terms upon which corporations should do business in the State, was not valid, Mr. Justice Harlan said, p 37:

> "Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise is to allow form to control substance."

In Southern Pacific Ry. Co. v. Denton, 146 U. S. 202, the statute considered prohibited a foreign corporation from removing cases to the Federal Court. This court held the statute unconstitutional, saying, p 207:

> "But that statute requiring the corporation as a condition precedent to obtaining a permit to do business within the State, to surrender a right or privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions."

In Chat. R. & C. Ry. Co. v. Evans, 14 C. C. A. 116, a case before the Court of Appeals for the Fifth Circuit, Judge Lurton said (p. 120):

> "Neither would a statute be valid which imposed any provision conflicting with the Constitution and laws of the United States."

The broad language in Paul v. Virginia and Bank of Augusta v. Earle, as to the right of States to deal with corporations, has been misunderstood in many instances, and many decisions of the State Courts can be found holding that the right of the States to deal with corporations is not trammeled by the Federal Constitution or legislation

thereunder, so long as the States reserved a power to alter and amend charters.

A number of cases in this court have been quoted as sustaining this extreme view, but upon an analysis of them none will be found which authorize it. For instance, the language of Mr. Justice Field, in Horn Silver Mining Co. v. N. Y., 143 U S. 305, has been sometimes misunderstood as sustaining the absolute right of the States to abrogate the United States Constitution and laws as to corporations. A consideration of this case will show that it did not involve that question and that the point decided by this court was merely the right of a State to tax the franchise of a corporation as property.

Ashley v. Ryan, 153 U. S. 436, involved the right of a State to charge a license fee based upon the entire capital stock of a corporation. As the corporation was not engaged in interstate commerce, and as the tax proposed would not be a burden on interstate commerce, the case was not like the one of Western Union Tel. Co. v. Kansas, *supra*. This case did not deal with any situation where a State proposed to deny to corporations rights conferred by the Constitution and laws of the United States. The terms imposed in that case might have been more than the local business was worth to the corporation, but these terms did not suspend the operation of the Federal laws and were not derogatory to the dignity or supremacy of them.

Hooper v. California, 155 U. S. 648, involved the right to require insurance agents to secure licenses. The

business of insurance was held to be a proper subject for classification, and as there was the difference in conditions and situation of those engaged in this business that would authorize the classification, there was no denial of the equal protection of the law. In holding that the State had the right to impose these terms, on page 656 of the opinion, this court said that the State power is *"subject always of course to the paramount authority of the Constitution of the United States."*

Orient Ins. Co. v. Daggs, *supra*, involved the application of a valued policy law to fire insurance companies. The classification of the business of fire insurance companies by this legislation and the burdens imposed on all of this class was properly sustained.

In Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, the statute under consideration prohibited corporations who had violated the anti-trust law of Texas from doing business in the State. The statute was upheld under the power to regulate corporations. It was urged that the last anti-trust statute of Texas was unconstitutional in that it exempted labor organizations from its provisions, but it was held that if that act was unconstitutional on that account, a prior act which did not contain the exemption was in force, and the suit was maintainable under that. The suit dealt with the punishment of a corporation for violation of a criminal law and the ouster from the State on this account was held to be justified. As corporations could not be imprisoned, they were a proper subject for classification for a different

punishment for violation of a criminal law than was inflicted upon individuals.

In Philadelphia Fire Assn. v. N. Y., 119 U. S. 110, the point involved was the right to charge a foreign corporation a greater license fee than was charged domestic corporations. There are reasons why a foreign corporation would occasion mere trouble to the accounting and recording officers of the State than would the affairs of a domestic corporation, and as a basis for the classification existed, the classification was justified. However, in this case, the court took occasion to remark that the right of a State to deal with corporations was "subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union."

The dissenting opinion of Justice Harlan was on the ground that the equal protection of the laws was violated by the discrimination. The majority of the court was of the opinion that there was a proper instance for classification.

In reviewing the decisions of this court on the question now before it, we are impressed with the pains displayed in the preparation of all the opinions in cases dealing with the right of States to deal with corporations to explain that this right of the State to impose terms upon corporations must be always exercised with due regard to the Constitution and laws of the United States.

We respectfully insist that the right of the States to deal with corporations is restricted by the Constitution and

laws of the United States. The States have no power to set aside these laws in any particular or in any situation. Were the States permitted to do this, these laws would be no longer supreme. The case now before the court is not at all like any of the other cases that have been here, where statutes regulating the relations between the employer and employed were involved. Statutes abolishing the fellow servant doctrine as to railroads and other classes of business have been before the court with the argument that such statutes deny the equal protection of the laws, but in all of these cases the court has sustained the legislation only on the ground that they made a classification applying equally to all that were in the same situation.

In Tullis v. Lake Erie & Western Railroad Co., 175 U. S. 348, an act of Indiana abolished the fellow servant doctrine as applied to railroads and other corporations except municipal corporations. The Supreme Court of Indiana held that the act was valid as applied to railroads and capable of severance, and sustained that portion applying to railroads (Ry. v. Montgomery, 152 Ind. 1). This court of course considered the statute as construed by the Supreme Court of Indiana, as applicable to railroad companies only, and its constitutionality was upheld. An exception in favor of municipal corporations was held to be proper because of the difference in the operations of such corporations and their relations with their employees, this fact furnishing sufficient basis for the classification.

In Minnesota Iron Co. v. Kline, 199 U. S. 593, the statute considered applied only to railroads. and this court

held that this was a proper classification because of the peculiar hazards to which employees of railroads were exposed.

In the earlier case of C. & N. W. R. Co. v. McLaughlin, 119 U. S. 566, the statute considered abolished the fellow servant doctrine as applied to railroad companies. The judgment was affirmed on the ground that the classification of the business of railroads was justified.

A similar case was that of Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205, the court remarking in that case that the character of the business of railroads justified the classification.

In Chicago, etc., Ry. Co. v. Pontius, 157 U. S. 209, the statute of Kansas construed in Missouri Ry. Co. v. Mackey, *supra*, was involved, the Supreme Court of Kansas having construed its operation to extend to an incidental employment of a servant by a railway company. The only question before the court was whether the statute, as extended to this incidental employment, was proper, and the court held that it was.

And so, in similar cases. In St. Louis, Iron Mountain & Southern Ry. Co. v. Paul, 173 U. S. 404, an Arkansas statute requiring that railroad companies should pay their employees promptly on their discharge was considered. This statute was sustained on the ground that the public nature of the business of railroads justified the public policy that its employees should be promptly paid; and the statute was upheld because of this proper classification. The court said (p. 408):

"As this amendment rested in reasons deduced from the peculiar character of the business of the corporations affected and the public nature of their functions and applied to all alike, the equal protection of the law was not denied."

And so in Minneapolis & St. Louis Ry. Co. v. Emmons, 149 U. S. 364, the validity of a statute of Minnesota requiring railroads to fence their tracks was sustained as a proper classification.

In Farmers, etc. Ins. Co. v. Dobney, 189 U. S. 301, it was held that a statute allowing attorney's fees to be taxed against defendants in suits on insurance policies was valid. In this case Mr. Justice White explained that there was a reason why insurance companies should be classified so that prompt payment of their losses could be secured. The point that there must be a real basis of classification was announced by the entire court, Justices Harlan, Brewer and Brown dissenting on the ground that the classification in that case was arbitrary.

In Hammond Packing Co. v. Arkansas, 212 U. S. 322, the point involved was whether corporations could be required to produce their corporate books in a proceeding under the anti-trust law. It was urged that the relief prayed would violate the equal protection clause (335), and that the remedy would constitute an *unreasonable* search and seizure. In previous decisions this court had held that corporations could be properly classified and charged with the duties of making reports where this duty was not imposed on individuals, and could be charged with the duty

of permitting their books to be inspected by the State in which they were doing business to the end that the State might ascertain that their business was being lawfully conducted. This distinction, because of the nature of the entity of a corporation, was held to furnish a proper basis for classification. However, it was remarked in this case that corporations were only liable to *reasonable* searches, and that *unreasonable* searches and seizures would not be authorized because this was a protection guaranteed by the Constitution and laws of the United States.

PLAINTIFF IN ERROR NOT A RAILROAD COMPANY.

It will probably be contended that if the court agrees with our contention that the statute denies to corporations the equal protection of the law, still plaintiff in error is a railroad company, and as railroad companies can be properly classified for such legislation, defendant in error can not be heard to complain, and that the statute is separable, and if unconstitutional as to other corporations, should be sustained as to railroad companies. This argument will involve the question whether plaintiff in error is a railroad company within the meaning of the terms of the act, viz., "all railroad companies, whether incorporated or not;" and the further consideration that if plaintiff in error is within this designation, whether the act is separable so that it can be sustained as to railroad companies and companies engaged in mining coal, though the application of the act to other corporations is invalid. The act has not been con-

strued by the courts of Arkansas except that it is constitutional in its entirety, and it therefore goes to this court in the form in which it was enacted by the Legislature for original consideration.

The business of plaintiff in error, as reflected by the record, is that it was incorporated as an aluminum company and was engaged in the business of mining and treating bauxite. It was not engaged in the business of mining coal. As a facility for the handling of bauxite, it operated a tramway that is in no sense a railroad, unless this term should be held to mean any form of conveyance that runs on rails.

The first tenet of construction to be borne in mind in considering a legislative enactment is that the words used are to be given their plain, ordinary meaning. We think the words "railroad company" have a definite and well understood meaning. The plain, ordinary meaning of the words could not be improved upon to specifically designate those companies engaged in the railroad business; *i. e.*, common carriers transporting persons and freight over a railroad. A company engaged in mining and drying bauxite would be about as far removed from what is understood by the designation "railroad company" as would be possible to imagine.

Some courts have had occasion to consider what was meant by the term "railroad company," and unless there has been some strong reason for enlarging or restricting the ordinary meaning of the term, it has been given this ordinary meaning.

In Bridewell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, it was contended that a terminal company—that is, a railroad company engaged in the business of carrying freight and passengers as a common carrier, but only about three miles in length—was not a railroad company, and therefore was not subject to the Georgia statutes requiring railroad companies to be incorporated in a certain form. The court, however, found no difficulty in holding that if it was incorporated for the purpose of building and operating a commercial railroad as a common carrier, it was a railroad company.

In Union Trust Co. v. Kendall, 20 Kan. 515, it was said (p. 517):

> "If a corporation is shown to be engaged in the business of manufacturing, it is proper to call it a manufacturing corporation. If it is operating a railroad, is it not a railroad corporation?"

In Bloxham v. Ry. Co., 36 Fla. 519, 18 Sou. 444, the court considered the meaning of the word "railroad" as applied to a street railroad, and said:

> "The word 'railroad,' as generally used, applies to commercial railways engaged in the transportation of freight and passengers for long distances and as a general rule having steam engines for motive power, and making stops at regular stations for the receipt and discharge of freight and passengers."

In Funk v. St. Paul City Ry. Co., 61 Minn., 435, 63 N. W. 1099, the court held that the term "railroad company" used in the Minnesota statute abolishing the fellow servant doctrine as to railroad companies, did not apply to street railroad companies.

See also State v. Duluth Gas & Water Co., 76 Minn., 96; 78 N. W., 1032.

It has been consistently decided in other cases that the term "railroad" or "railroad company" does not apply to street railroads.

> Hectorville N. & F. Pas. Rd. Co. v. City of Philadelphia, 89 Pa. St. 210, 219.
>
> Manhattan Trust Co. v. Sioux City Cable Ry. Co., 68 Fed. 82, 84.
>
> Riley v. Galveston City Ry. Co., 13 Tex. Civ. App. 247, 35 S. W. 826.
>
> Lincoln Street Ry. Co. v. McClellan, 54 Neb. 672, 74 N. W. 1074.
>
> Louisville & P. Ry. Co. v. Louisville City Ry., 2 DuVal (Ky.), 175.

In Williams v. City Electric Rd. Co., 41 Fed. 556, there was considered a statute of Arkansas, authorizing a city to grant the right-of-way through its streets "to any railroad company," and requiring the railroad company to pay property owners the damages they sustained thereby. In this case the court held that the provision did not apply to street railway companies, saying:

> "The difference between street railroads and railroads for general traffic is well understood."

See also—

> Thomas & Houston Electric Co. v. Simon, 20 Ore. 60, 25 Pac. 147.

In St. Louis, Iron Mountain & Southern Ry. Co. v. Paul, 173 U. S. 404, the legislation of the State of Arkansas requiring railroad companies to pay the wages of their employees promptly, etc., was considered. The act originally applied to corporations or persons engaged in the business of operating or constructing any railroad. In considering the validity of this legislation, as applied to railroad companies, this court said (p. 409):

> "*In view of the fact that these corporations were clothed with a public trust and discharged duties of public consequence affecting the community at large,* the Supreme Court held the regulation, as promoting the public interest in the protection of employees to the limited extent stated, to be property within the power to amend, reserved under the State Constitution."

The addition of the terms "whether incorporated or not" following the words "railroad company," do not change the ordinary meaning of the words "railroad company," and in Arkansas nearly all legislation applying to railroad companies in express terms apply to persons or corporations operating a railroad. If it was the design of the Legislature to apply the act to the business of railroad companies as popularly understood, the addition of the words "whether incorporated or not" would show the intention to apply the act to all railroad companies, as that term is understood, whether the railroads were operated by corporations, individuals or persons, and would exclude the idea that railroad companies in the hands of a receiver should not be subject to the act, as has been held by some courts of last resort, when the words "railroad company"

and "railroad corporation" only were ussd.

Bonner v. Franklin Co-op. Assn., 4 Tex. Civ. App. 166, 23 S. W. 317.

Turner v. Cross, 83 Tex 218, 18 S. W. 578, 579.

In these cases it was held that a receiver engaged in operating a railroad was not a railroad company

It has been the policy of the Legislature of Arkansas, when passing acts applying to railroad companies, to usually embrace within the express terms, both corporations and persons. The following references are to Kirby's Digest of the Statutes of Arkansas:

Section 6487 provides that "whenever any railroad company, corporation, individual or individuals, shall purchase any railroad" the consolidated company shall be liable for all debts.

Section 6606 provides that "all persons, agents and corporations who own or operate any railroad in this State" are authorized to use certain means to protect their passengers.

Section 6611 provides the maximum sum that may be charged for carrying passangers, etc., by "any corporation, officer of court, trustee, person or association of persons operating a line of railroad in this State."

Section 6649 provides that "whenever any railroad company or corporation or any receiver operating any railroad engaged in the business of operating or constructing

any railroad," shall discharge any employee, his wages shall be paid without deduction or delay."

Section 6672 provides that "all railroad companies, private corporations or individuals, owning or operating a railroad" shall furnish double deck freight cars under certain circumstances.

Section 6675 provides that "all railroads operating in this State" shall maintain track scales, etc.

Section 6696 provides that the terms "railroad or transportation company" in the act prohibiting the giving of free passes to certain State officers, shall be taken to mean "all corporations, companies or individuals now owning or operating * * * any railroad or transportation line," etc.

Section 6732 provides that the laws prohibiting discriminations by railroads shall be interpreted to that "the term 'railroad or railroad corporation' contained in this act shall be deemed and taken to mean all corporations, companies, or individuals now owning or operating * * * any railroad in this State."

The act creating the railroad commission contains many references showing that it applies to "persons or corporations operating a railroad." Sections 6802, 6803, 6804, 6805, 6807, 6811, 6812, 6813, and 6817.

As we have stated, we think the term "railroad company" is so well understood by all persons as not to merit an effort to construe its meaning.

In Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, on page 33 the court said:

> "It is not only the safer course to adhere to the words of the statute construed in their ordinary import, instead of entering into any inquiry as to the supposed intention of Congress, but it is the imperative duty of the court to do so."

And in U. S. v. Goldenberg, 168, U. S. 95, 102, the court remarked:

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used."

And in the early case of U. S. v. Gooding, 12 Wheat. 460, on page 478 the court said:

> "We must take the laws as we find it upon examination of its language."

In Lake County v. Rollins, 130 U. S. 662, 670, it was said:

> "To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort in all cases is to the natural signification of the words in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it."

While we are in full accord with the remark of Justice Holmes, in his opinion in Ryales v. Mechanics Mills, 150 Mass. 190, 194, that

> "General maxims are oftener an excuse for the want of accurate analysis, than a help in determining the extent of a duty or the construction of a statute."

Still, in construing this statute in this instance, we think that the principle that the act is in derogation of the common law and should be strictly construed in the sense that the words used are not to be extended beyond their plain meaning, has full application. The act certainly imposes burdens upon some employers that were not imposed by the common law. It changes the common law with reference to the relation of master and servant, imposing a new burden upon the one and giving a new right to the other. The question presented to this court now is whether the burden imposed is to be extended by implication beyond the plain ordinary meaning of the words used, to situations that are not within these words; that is, are the terms "railroad company" to be extended by intendment to include all situations where cars on wheels are moved over rails, irrespective of the character of the business of the company engaged in this work. We think obviously the act is to be confined to the literal, plain meaning of the words used, and these words are not to be stretched to include situations beyond their meaning and beyond any intent that can be gathered from the scope of the act and its operation. In arguing this question, we are not unmindful of the principle that legislation on the relations between employer and employee is often remedial in its nature, and as such entitled to a liberal construction, such as was referred to but not necessary to be applied in Johnson v. Southern Pacific Ry.

Co., 196 U. S. 1, wherein the safety appliance act was construed; nor within the principle applied by Justice Holmes in Ryales v. Mechanics Mills, *supra.*

It is not a question of construing the scope of a remedy provided by the statute, but it is a question of *who are included within* the burdens of a statute, that is in derogation of the common law.

Illustrating the idea that we mean to present, we refer to the language of the court in Thompson v. Baxter, 8 Pickle (Tenn.) 305, a decision construing a mechanics' lien law:

> "This lien is purely statutory, and unknown to the common law. Only those enumerated and embraced in the statute are entitled to the lien. A liberal construction of the mechanics' lien law does not mean that they shall be liberally construed in embracing or including others than those enumerated in the statutes. It must clearly appear that the claimant has a lien. No one is entitled to the lien unless the statute includes him or them. They are not to be included by strained construction. Unless the statute gives the lien, the party has none."

The point is well set forth by Mr Sutherland in his book on Statutory Construction (Lewis), sec. 575:

> "Statutes not remedial, which are in derogation of the common law of England, brought over by the colonists, so far as applicable to the new circumstances and conditions of the people and the country, and so far as not changed by legislation, are the law of the States generally; and courts will construe strictly all acts in modification or derogation thereof. Assuming that the Legislature has in the terms used, expressed all the change it intended to make in the old law and will not by construction or intendment enlarge their operations."

See also Northern Pacific Ry. Co. v. Whalen, 149 U. S. 157; *In re* Swam, 150 U. S. 649.

In Bouson v. Harry E. Busenbork, 44 Kan. 669, *supra*, the court held that the statute of Kansas abolishing the common law rule of master and servant was an act in derogation of the common law and was to be strictly construed as to the persons intended to be included within its terms.

In order for the court to adopt a construction beyond the ordinary meaning of the language used, there must be some reason gathered from other portions of the act under consideration or from the subject to which it applies, showing that the legislative intent was not exactly that shown by the terms of the act. We respectfully submit that no circumstances exist calling for a construction of the act under consideration beyond what its plain terms imply. The entire act is embraced in one short section, and it does not present the situation of a lengthy act with many sections and provision, calling for the harmonious construction of the whole. Its title is "An Act to give right of action against an employer for injuries or death resulting to his agents, employees or servants, either from the employer's negligence or from the negligence of some of his other employees, servants or agents, and to repeal all acts and parts of acts in conflict herewith." This indicates nothing beyond what the plain terms of the act itself do.

It is proper that we should consider the construction placed upon an act of the Legislature of Minnesota, abolish-

ing the fellow servant doctrine in that State as applied to railroad companies. This act was before this court in Minn. Iron Works v. Kline, 199 U. S. 593. The facts in that case show that the defendant was engaged in the mining business and was operating a tramway very similar to the one operated by the defendant in this case. The Supreme Court of Minnesota held that the operations of this tramway were within the provisions of the State enactment abolishing the fellow servant doctrine as to "every railroad corporation." Of course, the ordinary meaning of the term "every railroad corporation" would not extend to the business of the defendant in the Kline case, and the occasion for the construction of these terms beyond their ordinary meaning was a strong one in the view of the law held by the Supreme Court of Minnesota. A forcible rule of construction is that an act will be so construed as to be constitutional, and a construction rendering an act unconstitutional will be avoided if possible. This rule of construction has necessarily brought about the construction of legislative enactments in some instances much broader, and in some instances much more restricted, than their plain language would import.

In Lavallee v. Ry. Co., 40 Minn. 249, 41 N. W. 974, it appeared that the plaintiff, an employee of the St. Paul, N. & M. Ry. Co., who was injured by the negligence of a fellow servant, was not directly engaged in the operation of a train at the time of his injury, and it was urged upon the court that the statute abolishing the fellow servant doctrine as to those in the employ of railroad companies

applied only to those who were actually engaged in the operation of trains. In construing the statute, the court said:

"The question is whether this statute includes all employees, agents and servants of the railroad corporation without regard to the character of the business in which they are employed. *Taken literally, it does.*"

And again, in applying a rule of construction authorizing the court to depart from the literal meaning of the words used, the court said:

> "The objection made to the construction of the statute which the appellant contends for is that upon that construction the statute would be what is some times called class legislation, by imposing upon one class of persons liabilities from which others in precisely the same circumstances are exempt. It is to be presumed unless the language used excludes such presumption, that the Legislature does not intend an act to so operate as to be open to that objection."

The court then proceeds to construe the statute as intended to apply only to the *hazardous* part of railroading, deeming the hazardous part of railroading to be that portion involved in the actual operation of trains, and the court held that plaintiff was not within the intent of the statute thus construed, and could not recover.

In Johnson v. Ry. Co., 43 Minn. 222, 45 N. W. 156, the plaintiff injured was engaged in repairing a bridge. The court referred to the holding in the Lavallee case and said of it: "We held that applied only to the peculiar hazards incident to the use and operation of railroads;

that it must be construed as designed exclusively for the benefit of those who are in the course of their employment exposed to such hazards and whose injuries are caused by them. And the more we consider the question the more we are confirmed in the opinion *that it is only when construed as subject to some such limitation that the statute can be sustained as a valid law.*" In this case the court denied a recovery.

In Schus v. Powers, Simpson Company, 85 Minn. 447, 89 N. W. 68, 70, the principle applied in the earlier cases was applied to a situation where the defendant was engaged in the manufacturing of lumber and had a logging railroad in connection with its plant. In the opinion holding the defendant liable, the court said:

> "The spirit and purpose of the statute must be looked to in determining its scope and application; and as the spirit and purpose of this law was the protection of employees engaged in a hazardous and dangerous work, *though the literal language thereof limits its operation to railroad corporations,* we hold that it applies to any corporation or person engaged in operating a line of railroad incident to which operation are the dangers and hazards to employees the Legislature intended to provide against."

The opinion of the Supreme Court of Minnesota, in Minn. Iron Works v. Kline, which finally reached this court, is reported in 93 Minn, 63, 100 N. W. 681. A similar statute of the State of Iowa was construed by the Supreme Court of Iowa as applying to the hazards of moving trains, but this construction was because of the express language

of an amending act whereby it applied to "every corporation *operating* a railway."

Pierce v. Iowa Central Ry. Co., 73 Ia. 140, 34 N. W. 783.

The original Iowa act of this character was passed in 1862, and applied to every railroad company. In 1873 its language was changed to "every corporation and person owning or operating a railroad," and in 1873 the provision was modified as we have quoted. The fact that the amendments restricted the prior general language was the occasion for the holding of the Iowa courts.

A similar statute of Kansas, that is, one abolishing the common law fellow servant doctrine applying to railroad companies, applies by its terms to "every railroad company organized or doing business in this State," and it has been held that this statute is not confined to persons working about moving trains.

In Union Pacific Rd. Co. v. Harris, 34 Kan. 416, 6 Pac. 571, the statute was applied to the instance of a section hand employed by a railroad company on whom a co-laborer let a rail fall.

In Atchison, T. & S. F. Ry. v. Brassfield, 51 Kan. 167, 32 Pac. 814, it was applied to the instance of a section hand who was injured by a co-laborer while they were both handling ties in repairing a railroad track.

In Chicago, R. I. & P. Ry. Co. v. Stahley, 11 C. C. A. 88, 62 Fed. 363, is was held that the act applied to an

employee in a roundhouse or repair shop, who was injured while engaged in working on a locomotive.

In Bouson v. Harry E. Busenbork, 44 Kan. 669, it was held that the act did not apply to an instance where an employee was injured by the negligence of a fellow servant, both being employed by a firm of contractors engaged in constructing a railroad, *although the injury occurred in the operation of trains.* In this decision the court held that the act applied only to railroad companies, and that contractors operating a construction train were not such.

The opinion in this case refers the views therein expressed as being the same as those held by the court at the time of the decision in Ry. v. Mackey, 33 Kan. 398, a case which afterwards reached this court (citation *supra*).

A similar act in force in the State of Missouri has been construed as applying to all employees of railroad companies without regard to the particular occupation in which they were engaged at the time of the injury.

See Callahan v. St. Louis Merchants Bridge Terminal Ry. Co., 170 Mo. 473, 492, 71 S. W. 208.

The Missouri court did not feel compelled to depart from the plain meaning of the words used in the act by the consideration that if it was construed to apply to all employees of a railroad company without regard to the dangerous agencies with which they came in contact, the legislation would be open to the criticism that it was arbitrary class legislation, and therefore unconstitutional.

In Callahan v. St. Louis Merchants Bridge Term. Ry. Co., *supra,* the facts were that the employee injured was a section hand engaged in repairing a piece of railroad track by taking out old ties and putting in new ones. In handling these ties, one of them was thrown so that it struck plaintiff and caused the injury complained of. The work in which plaintiff and his co-employees were engaged was being done on a bridge. The facts in this case were similar to those in Johnson v. Ry. Co., 43 Minn. 222, *supra,* wherein the court of Minnesota held that the railroad company was not liable because the statute abrogating the fellow servant doctrine as to railroad companies did not apply to the employment in which the plaintiff was engaged. The Missouri court held that its act did apply, and in an elaborate and instructive opinion, discussed the cases from Minnesota, Kansas and Indiana, and held that the classification of all railroad employees without regard to the dangerous agencies with which they came in contact was not an arbitrary classification and was justifiable.

In Ry. Co. v. Ivy, 73 Ga. 504, one bridge builder was killed by the negligence of another bridge builder while they were both engaged in building a bridge for a railroad company. The plaintiff invoked the provisions of the Georgia statute making railroad companies liable for any damage done by the running or locomotives, cars or other machinery and for damage done that was the fault of one of their employees. The court held that the operation of this statute was not limited to the mere running of trains, but

extended to all employments that contributed thereto, necessarily being all employments of a railroad company.

See also:

Thompson v. Central R. & Bkg. Co., 54 Ga. 509.

Georgia R. & Bkg. Co. v. Brown; 86 Ga. 320.

Georgia R. & Bkg. Co. v. Miller, 90 Ga. 571.

The Indiana fellow servant law applied to every railroad or other corporation.

In Railroad Co. v. Montgomery, 152 Ind. 1, the court held that the act was capable of severance as to other corporations but applied to railroad companies, not merely to the particular hazards of being about running trains, but to the particular hazards incident to all employments for railroad companies. As construed by the Supreme Court of Indiana, this statute was deemed valid by this court in Tullis v. Ry. Co., 175 U. S. 348. The Missouri act construed as applying to all employees directly conected with the operation of trains, in Callahan v. St. L. Merchants Bridge Term. Ry. Co., *supra,* was affirmed by this court in 194 U. S. 628.

The Wisconsin act was held valid as applying to all employees of railroad companies, in Ditberner v. Ry. Co., 47 Wis. 138, 2 N. W. 69.

So it seems that the interpretation of the terms "railroad company" given to the Minnesota statute by the courts of that State was induced by the opinion that unless

construed to apply to the actual operation of railroad trains, the legislation would be unconstitutional. This conclusion is given as a reason for departing from what was declared to be the literal meaning of the words used. We think this reasoning has never been approved by this court, and the most that can be said of the decision of this court in the Minn. Iron Works case is that the court merely adopted the construction given by the State court to one of the State statutes, the statute *as construed* being the law which this court was invited to consider. The decisions of this court in adopting the construction placed upon the Missouri act by the Missouri courts, and on the Indiana act by the Indiana courts, was a different construction and based on different reasons than was that in the Minnesota case. Of course, no criticism could be made of the opinions of this court in any of these cases.

As the act now before this court has not been construed by the State court, the meaning of the terms used come to this court for original construction.

In construing this act, the intent of the Legislature is to be gathered from the situation legislated upon, as well as the language of the act used. There is nothing in the act that makes it applicable to any peculiar hazards of a railroad company or a mining company or other corporation. Its title and substance indicate that it classifies these employers for certain liabilities, and it is not an attempt to classify the particular hazards attending work about running trains. Reflection upon the history of the fellow

servant doctrine seems to us to furnish the correct guide for the interpretation of the statute as applied to railroad companies. The history of the doctrine is presented in the opinion in Chicago, etc., Ry. Co. v. Ross, 112 U. S. 377, 383, 386. Its original application was of course to situations in industries very much less complex than they are at the present day. The doctrine was largely based upon the fact that the employee intimately associated with a fellow employee was as capable of judging of his customary care or negligence as was the master, probably more so; and as so applied, the doctrine seemed eminently fair and just. However, applying the original doctrine to all employees of a modern railroad company where the injured employee pehraps had no opportunity of even being acquainted with the employee whose negligence he assumed, produced a situation that worked injustice.

In Hough v. Ry. Co., 100 U. S. 213, this court held that at common law all employees of railroad companies below the heads of departments were fellow servants.

In Northern Pac. Ry. Co. v. Dixon, 194 U. S. 338, 346, this court held that a telegraph operator was a fellow servant with a fireman, the fireman having been killed by the negligence of the telegraph operator *in receiving train orders.*

It will be noted that in cases like this, the employees whose negligence is assumed by other employees under the fellow servant doctrine, were remotely removed from each other and did not have that opportunity of judging of the

customary care or negligence of each other, which was the particular reason on which the fellow servant doctrine was based.

In Oakes v. Mase, 165 U. S. 363, 364, it was held that the relation of fellow servants existed between employees of different trains, and in Northern Pacific Ry. Co. v. Hambly, 154 U. S. 349, it was held that the relation existed between employees on tracks and those on moving trains. With railroad companies perhaps more than with any other calling, the coemployees are widely separated and have not the opportunity of knowing each other. This condition led to the adoption of legislation restricting the common law fellow servant doctrine as applied to railroad companies, and what was known as the "different department" rule, and the "superintendence and control" rule were enacted by many Legislatures, and announced by some courts as an application of the common law rule to changed conditions. For illustration, in the year 1893 the Legislature of Arkansas adopted both the "superintendence and control" and the "different department" exceptions to the common law fellow servant doctrine, applying these exceptions only to railroad companies. In such instances the fact that their employees are widely separated from each other furnishes a sufficient reason for the abrogation of the fellow servant doctrine as applied to them and furnishes the only reason, unless it be considered that the interest which the public has in the business of the operation of railroads furnishes an additional reason. That this latter

reason has been considered by this court as justfying a classification in cases like this was held in Charlotte, etc., Ry. Co. v. Gibbes, 142 U. S. 386, 393. If these reasons are not the reasons for the classification, we respectfully submit that none others can be imagined that are not open to the criticism that they have no proper application. Therefore the real occasion for abolishing the fellow servant doctrine as to railroads is not because the business of running trains is more dangerous than many other pursuits and merely because locomotives and trains are a dangerous agency, but because railroad employees are so distant from each other as a whole, that it is unfair to make each of them assume the results of the negligence of each of the others. It may be said that some railroad employees are intimately associated with some others, and that the rule should apply to them while it may not apply to all others. But the trouble with this argument is that legislation on such matters can not apply to all details and must not necessarily be upon a strictly scientific basis. It is sufficient if as a whole the classification is reasonable, and it will not be held invalid because the reasons for the classification may not strictly apply to isolated instances. An illustration of this doctrine is supplied by Mo., etc., Ry. Co. v. May, 194 U. S. 267, 269, where a penalty was imposed upon railroad companies for allowing Johnson grass to grow upon their rights-of-way, the liability not being applied to others that might permit the growth of Johnson grass so that it was liable to spread.

In our opinion such legislation can not be logically defended on the ground that the running of railroad trains is the most hazardous of any occupation. As a matter of fact, it is well known to all that it is not. Saws and exposed cutting tools in factories are obviously much more dangerous to employees working around them than are railroad trains. Who would say that working in a powder mill was not more hazardous than operating a railroad train? Diving and working in caissons beneath the surface of water, tunnels under rivers, work high in the air in the construction of tall buildings, and work about molten metal and furnaces, and many other employments that are readily called to mind, are all occupations that appeal to one as being much more hazardous than that of operating railroad trains. So while legislation applying only to the operation of railroad trains as an extra hazardous employment would be constitutional because of the doctrine that such legislation must not be strictly scientific or deemed constitutional only upon a nice weighing of differences, still there are stronger reasons for applying legislation of the kind before the court to all the operations of railroads than there would be in applying it only to the hazardous work about railroad trains and including in it what are supposed to be similar hazardous occupations engaged in by companies not within the words of the statute. In other words, there are more and sounder reasons for construing an act like the one before the court to apply to all the employees of a railroad company than there would be for restricting it to apply only to the hazards of operating trains and enlarging the scope

of the act to extend to other companies than railroad companies because they had similar hazards in the operation of trains.

IS THE ACT SEPARABLE?

If this court should be of the opinion that the defendant is a "railroad company" within the meaning of the statute now before the court, the question then arises, Is the act separable, so that it can be sustained as to all railroad companies, though it is unconstitutional as to all other corporations? This inquiry involves a consideration of what was the intention of the Legislature. It is plainly shown by the act. That intention was to apply the rule to all corporations and to all individuals who were engaged in the railroad business, and to all corporations and individuals who were engaged in operating coal mines. Whether it would have been enacted if it had applied only to railroads or only to coal mines, or only to both, is a matter of speculation on which no light can be thrown by a reading of the act. There are few railroads and few coal mining companies, compared with all the other corporations of every kind and character. Therefore, to strip the act of its sweeping application and confine it to the very narrow application would probably make a law which the Legislature itself was unwilling to make. This is not a case where the act consists of many sections and many provisions, from which it could appear that the Legislature would have enacted the one even though it had not enacted the other. But the whole of this act is contained in *one*

section. To change this section is to change what the Legislature intended to enact into a law, which perhaps it would not have enacted as changed. The title of the act shows that it was intended to classify employers and the language "An Act to give right of action against an employer for injuries or death resulting to his agents, employees or servants" etc., shows an intention that the act should operate as a whole or not at all.

In the Trade Mark Cases, 100 U. S. 98, it was strongly urged upon the court that although the legislation might be invalid as applied to commerce among the States, it was constitutional as applied to the Territories. But in answer to this argument the court said:

> "If we should in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress and in others under State law."

And so we say that should the court sustain the act as to railroad companies and coal mining companies only, it would probably enact a statute that the Legislature was unwilling to enact, and restrict the meaning of a general law applicable to many situations to a very few.

In Baldwin v. Franks, 120 U. S. 678, 685, in speaking of the rule for the separation of statutes unconstitutional in part, the court said:

"To give effect to this rule, however, the parts—that which is sustained and that which is unconstitutional—must be capable of separation so that each may read by itself."

In Connolly v. Union Sewer Pipe Co., 184 U. S. 540, in construing the anti-trust act of Illinois with reference to its exemptions of those engaged in farming, the argument that the statute could be separated was considered, and the court held that as the act consisted of *one section*, to strike from the statute an unconstitutional exemption would probably enact what the Legislature was unwilling to enact, and the act was not separable. So we say that to strike from this act the language that gives it the most extensive application, and narrow it in its application to only a few, would probably enact what the Legislature was unwilling to enact at the time; and that the addition of the words "all other corporations" probably was the consideration that induced the Legislature to apply the rule also to railroad companies and companies engaged in mining coal.

In International Text Book Co. v. Pigg, 217 U. S. 113, in holding that the legislation of the State of Kansas, considered in that case, was not separable, the court laid stress upon the point that the parts asked to be separated were parts of the *same section*, saying: "It is well settled that if a statute is in part unconstitutional the whole statute must be deemed invalid if the parts not held to be invalid are so connected with the general scope of the statute that they can not be separately enforced, or, if so enforced, will not effectuate the manifest intent of the Legislature."

So we say that in this case the parts which the court would have to separate are parts of the same section, doubtless enacted as dependent upon and as compensations each for the other, and to separate them would not effectuate the manifest intention of the legislature but apparently would do violence to its intention.

In U. S. v. Ju Toy, 198 U. S. 253, 262, this court said:

> "But the relevant portion being a *single section* accomplishing all its results by the same general words, must be valid as to all it embraces, or altogether void."

We recognize the distinction that exists in this case and in the trade-mark cases, where the *effect* of the general language used was sought to be restricted by construction. But we see no distinction in principle between doing what was asked to be done in those cases and revamping a statute that was enacted to apply to a most numerous class, so that it applies to but a few of the class.

In Pollock v. Farmers Loan & Trust Co. (the Income Tax cases), 158 U. S. 601, 635, it appeared that the unconstitutional features of the act were in separate sections from those admittedly constitutional, but this court held that the several sections were so dependent one upon the other as to warrant the belief that the Legislature intended them as a whole.

We respectfully submit that the statute before the court in this case is not capable of separation; that on its face and by its terms it was enacted as a whole and must stand or fall as a whole. To consider that the Legislature would

have enacted it leaving out that portion of its language that gives it its broadest application and widest scope, restricting its application to a comparatively few, is to enact something that the Legislature itself probably would not have enacted. To say the least, it has not enacted it, and if it is desired that the law shall be enacted within its limited sphere, the Legislature is the proper one to pass upon the situation, and not the judgment of the courts.

Respectfully submitted,

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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States

ALUMINUM COMPANY OF AMERICA,
.....*Plaintiff in Error.*

v.

GEORGE H. RAMSEY.....*Defendant in Error.*

No. 56, October Term, 1911.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF OF THE DEFENDANT IN ERROR.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF OF THE DEFENDANT IN ERROR.

STATEMENT.

This writ questions the constitutionality of an act of the Legislature of the State of Arkansas adopted in 1907, providing that all railroad companies operating within the State, whether incorporated or not, and all corporations of every kind and character, and every company, whether incorporated or not, engaged in the mining of coal, shall be liable for injuries to employees resulting from the negligence of the employer, or any agent, servant or employee of said employer.

The plaintiff in error is an incorporated company, doing business in Arkansas, operating a mine and a railway. The defendant in error was employed as an engineer on said railway, and was injured while engaged in such service, after the adoption of the act of the Legislature referred to above, and brought his action, alleging that his injury resulted from the negligence of the corporation through one of its employees, a fellow servant of the defendant in error. The trial resulted in a verdict for the defendant in error, who was the plaintiff below. On the trial, the plaintiff in error asked a number of instructions designed to challenge the validity of the above-named act of the Legislature, on the theory that the act results in a discrimination against corporations because it abolishes the fellow-servant or common employee defense as to corporations and does not abolish the same as to natural persons. These instructions were not granted by the trial court, and on appeal to the Supreme Court of Arkansas it was held that the act was valid, because the Legislature of the State in adopting the act exercised the power reserved to it to alter or amend the charters of corporations. A writ of error was sued out to this court on the ground that the act of the Legislature, and the decision of the Supreme Court of Arkansas construing same, denied the plaintiff in error the equal protection of the law guaranteed by the Fourteenth Amendment, and denied the plaintiff in error due process of law. Or, to put it briefly, the plaintiff in error, a corporation, is here claiming that corporations must be treated the same as natural persons as to their liability for injuries to employees.

BRIEF OF POINTS AND AUTHORITIES.

I.

The act of the Legislature of Arkansas, adopted in 1907, is constitutional under the power reserved in the Arkansas Constitution of 1874, to alter or amend corporate charters.

Greenwood v. *Union Freight R. Co.*, 105 U. S. 13.

St. L., I. M. & S. Ry. Co. v. *Paul*, 173 U. S. 404.

Hammond Packing Co., v. *Arkansas*, 212 U. S. 322.

Northern Cent. R. Co., v. *Maryland*, 187 U. S. 258.

N. Y. & N. S. R. Co. v. *Bristol*, 151 U. S. 567.

Mo. Pac. Ry. Co., v. *Mackey*, 127 U. S. 205, approved in

Orient Ins. Co., v. *Daggs*, 172 U. S. 557.

Berea College, v. *Kentucky*, 211 U. S. 45.

Holyoke Water Power Co., v. *Lyman*, 15 Wall. 500.

Close v. *Greenwood Cemetery*, 107 U. S. 466.

Sperry & Hutchinson Co. v. *Rhoades*, 220 U. S. 502.

Knoxville Iron Co. v. *Harbison*, 183 U. S. 17.

C., B. & Q. R. Co. v. *McGuire*, 219 U. S. 565.

Shields v. *Ohio*, 95 U. S. 324.

Hamilton Gas Light & Coke Co. v. *City of Hamilton*, 146 U. S. 258.

II.

The adoption of the act is a legitimate exercise of the right of classification of corporations as artificial persons, subject to special rules, independently of the reserve power to amend charters.

Mo. Pac. Ry. Co. v. *Mackey*, 127 U. S. 205.

Minneapolis Railway v. *Herrick*, 127 U. S. 211.

Chicago etc. Ry. Co. v. *Pontius*, 157 U. S. 210.

Tulis v. *Lake Erie etc. Ry Co.* 175 U. S. 351.

Minnesota Iron Co. v. *Kline*, 199 U. S. 593.

Wilmington Star Mining Co. v. *Fulton*, 205 U. S. 60.

El Paso etc. Ry. Co. v. *Guiterrez*, 215 U. S. 87.

L. & N. Ry. Co. v. *Melton*, 218 U. S. 36.

Railway v. *Turnipseed*, 219 U. S. 35.

Southwestern Oil Co. v. *Texas*, 217 U. S. 114.

C., B. & Q. Ry. Co. v. *McGuire*, 219 U. S. 555.

Standard Oil Co. v. *Tennessee*, 217 U. S. 413.

Lindsey v. *Carbonic Gas Co.*, 220 U. S. ———.

Flint v. *Stone Tracy Co.*, 220 U. S. ———.

A., T. & S. F. R. Co. v. *Matthews*, 174 U. S. 104.

M., K. & T. v. *May*, 194 U. S. 267.

III.

The hazard incurred by the defendant in error was a risk of railroading as to which the Legislature might make a special rule.

Minnesota Iron Co. v. *Kline*, 199 U. S. 593.

IV.

There is no federal question involved, and this cause should be affirmed or dismissed under rule 6.

See our brief filed in this case at the October term, 1909, on separate motion for dismissal or affirmance under rule 6.

ARGUMENT.

THE ACT OF THE LEGISLATURE OF ARKANSAS, ADOPTED IN 1907, IS CONSTITUTIONAL UNDER THE POWER RESERVED IN THE ARKANSAS CONSTITUTION OF 1874, TO ALTER OR AMEND CORPORATE CHARTERS.

A brief history of the law in the State of Arkansas as to the fellow-servant rule, and as to the power reserved for the amendment of charters or corporations is of interest here.

There is no act of the Legislature in force in this State, nor has any ever been adopted, providing that employers

shall not answer to employees for the negligence of common employees. When the present domain of the State of Arkansas was a part of the Territory of Missouri in 1816, the common law of England, so far as the same was appilcable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defect of the common law, made prior to the fourth year of James I, (the reign of James I commenced March 4, 1603), applicable to a republican form of government, of a general nature and not local to the kingdom of Great Britain, and not inconsistent with the Constitution and laws of the United States, were adopted. When the State of Arkansas was admitted to the Union in 1836, this provision of the Territory of Arkansas was in force, and was re-enacted by the State Legislature in 1837.

The doctrine of common employment as a defense is first recognized in the English courts in the case of *Priestley* v. *Fowler* (3 Meeson & Welby 1), decided in 1837. It first appears in this country as a rule of the court in the case of *Murray* v. *South Carolina Railroad Company,* a decision of the Supreme Court of South Carolina rendered in 1841; and next appears in the well-known opinion of Chief Justice Shaw in *Farwell* v. *Boston & Worcester Railroad Corporation,* (4 Metc. 49), decided in 1842.

It has always been a subject of doubt with the authorities as to whether or not the rule of *Priestley* v. *Fowler,* and of the two earliest American cases, is a part of the common law of England or "judge-made law," growing out

of the exigencies of modern employment, but it is generally spoken of as a common law rule.

The rule was first announced by the supreme court of the State of Arkansas after the adoption of the Constitution of 1874—the present Constitution. *Little Rock & Fort Smith Ry.* v. *Duffy*, 35 Ark. 602; the court making no mention of *Priestley* v. *Fowler* or any other precedent. The Legislature has never referred to the rule or recognized it, except to restrict it as to corporations and dangerous employments. Therefore, the rule may be abolished or reversed generally, at any time by the Supreme Court of Arkansas. It is in no sense a vested right in any employer.

In the Constitution of Arkansas of 1874 it is provided that:

"Corporations may be formed under general laws, which laws may from time to time be altered or repealed. The General Assembly shall have power to alter, revoke or annul any charter of a corporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever in their judgment it may be injurious to the citizens of the State, in such manner, however, that no injustice shall be done to the incorporators."

Under this Constitution, the Legislature has provided for the incorporation of manufacturing, business and railroad corporations by the adoption of general charter laws, no special act of incorporation being allowable.

It is alleged in the complaint instituting this action that the Aluminum Company of America is a corporation organized under the laws of the State of Pennsylvania as

the Pittsburg Reduction Company, having changed its name to the Aluminum Company of America, and that it is authorized to do business in the State of Arkansas, and operates a mill in said State for the treatment of ore, and operates in connection with said mill a railway, and that Ramsey, the defendant in error, was employed on said railway as an engineer and was injured while so employed (Tr. p. 1).

The Aluminum Company answered, admitting the allegations as to its incorporation and being engaged in mining, but denied that it operated a railway. (Tr. p. 3).

But it was found by the Supreme Court of Arkansas that such company was operating, at the time of the injury, a narrow-gauge railroad for the purpose of hauling ore from the mines to the place where the ore was treated, and that the defendant in error, Ramsey, was injured while engaged as an engineer on said railway. (Tr. 135, 136). It also appeared that his injuries were due to the negligence of a fellow-servant, and the court held that such corporation was liable for the negligence of any of its servants resulting in injury to one commonly employed, under the act of 1907 quoted above, and that the Legislature in adopting such act exercised its power reserved in the Constitution of 1874 to alter or amend corporate charters (Tr. 135-147).

This holding, plaintiff in error contends, denies it the equal protection of the laws, because the same rule is not made as to natural persons who may be employers.

That the Legislature had the power to adopt the act in question is conclusively settled by the repeated decisions of this court construing constitutions and statutes of the states reserving power to alter, amend, or repeal charters of corporations. Such powers have been reserved by the states since the decision in the *Dartmouth College case* (4 Wheat. 518). In the case of *Greenwood* v. *Union Freight R. Company,* 105 U. S. 13, this court commented on the effect of the decision in the *Dartmouth College case* and recited a history of the reservation clause in acts of incorporation following such decision; and uniformly, to this date, the court has upheld the power of the states to alter, amend or repeal corporate charters when such power is reserved—and there seems to be no limitation on the power except that it shall not be used in a confiscatory way or to destroy vested rights, or to deny the jurisdiction of the courts of the United States. Nowhere in any of the decisions of this court is it intimated that there is an undue use of the power in denying to corporations the immunities accorded to natural persons. The rule in *Priestly* v. *Fowler,* and in all the other decisions of the courts adopting the fellow-servant rule, creates an immunity from liability in both natural persons and corporations, where corporations are given the immunities of natural persons. The act of the Arkansas Legislature involved here is but an amendment of the charter of Arkansas corporations withdrawing this immunity. The right is reserved to do so, and its exercise can result in no infringement of the guaranties of the Constitution of the United States or its amendments.

The power reserved to the State of Arkansas to amend the charters of its corporations has been examined in this court, in the cases of *St. L., I. M. & S. Ry. Co.* v. *Paul,* 173 U. S. 404, and *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, and it is not found to differ from the power reserved in the constitutions and statutes of other states which have repeatedly come before the court, except that all reserving acts or constitutions have not the proviso, "that no injustice shall be done incorporators." This proviso, however, is not involved in any degree in this case. It has been construed in cases in this court, which it is not necessary to cite.

In the long line of cases involving this reserved power, decided by this court, and coming up as a result of the states' legislatures' attempts to neutralize the effect of the doctrine of the *Dartmouth College case,* the point is usually urged that the amending act impairs the obligations of the contract created between the State and the corporation upon the grant of corporate powers. This court has uniformly decided that, under the reserve power, the State may withdraw any immunity or privilege that it may have lawfully denied at the time of charter. In *Northern Central R. Co.* v. *Maryland,* 187 U. S. 258, Mr. Justice White said in the opinion of the court:

"In considering this question, it will be borne in mind that it is elementary that where the Constitution of the State reserves the right to repeal, alter or amend, all charters granted by the Legislature are subject to such provision, and therefore, are wanting in that attribute of irrevocability which is essential to bring them within the intendment of

the clause of the Constitution of the United States protecting contracts from impairment. The cases supporting this doctrine are so numerous that they need not be cited."

The power was put upon a broader ground, as well as upon the specifically reserved right, in the case of *N. Y. etc. R. Co.* v. *Bristol*, 151 U. S. 567, where it was said:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the abligation of contracts or the deprivation of property without due process of law, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted nor the use of property be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the communities from injury. (Citing authorities). And also that a power reserved to the Legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it which will not defeat or substantially impair the object of the grant or any rights vested under it, and which the Legislature may deem necessary to procure either that object or any public right."

In the case of *Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S. 205, it is said:

"* * * *it cannot be successfully contended that the State may not prescribe the liabilities under which corporations, created by its laws, shall conduct their business in the future, where no limitation is placed upon its powers in this respect by their charters. Legislation to this effect is found in the statute books of every State."*

This language is repeated with approval in *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557.

If this be true, who doubts that the State of Arkansas, upon the granting of corporate charters, may not have imposed a condition that corporations so created should answer to employees for the negligence of fellow-servants? The State is not bound to permit the organization of corporations. It may therefore impose conditions, whether reasonable or not, provided that such conditions are not against the Constitution of the United States. Under the reserve power, the charter becomes a revocable license.

But this plaintiff in error is not raising the specific question that its contract of charter is impaired as against the prohibition of article 1, section 10, of the Constitution of the United States, but seeks to show that the Fourteenth Amendment is violated. According to our investigation, the first case occurring in this court in the long line of challenges of the State's right to amend charters, in which the impairment of the obligations of contract is abandoned as a ground for contest, and the Fourteenth Amendment's assurances of due process of law and equal protection of the law is resorted to, is the often cited case of *St. L., I. M. & S. Ry. Co.* v. *Paul*, 173 U. S. 404. The facts of that case are that the Legislature of Arknasas had adopted an act requiring railroad companies to pay their employees when discharged their unpaid wages then earned without reduction, and providing that on failure to do so the wages should continue for the space of sixty days as a penalty. The Supreme Court of Arkansas had construed this act as a lawful exercise of the power of the Legislature to amend

corporate charters, in the case of *Leep* v. *Ry.*, 58 Ark. 407, and *Railway* v. *Paul,* 64 Ark. 83. The latter case came here on writ of error, on the ground that the act denied such corporations equal protection of the laws and due process of law, because it was not made to apply to individual employers—natural persons. This court approved the opinion of the Supreme Court of Arkansas, upholding the act under the power to amend corporate charters reserved in the Arkansas Constitution of 1874. The plaintiff in error has raised the same question there disposed of, and its contention necessarily amounts to this: That when the Legislature creates corporations or admits them to do business, notwithstanding the reserve power, it does and must endow such artificial persons with all the privileges, rights and immunities of natural persons as to liability for negligence. This is necessarily the position of the plaintiff in error, because, if it should admit that, as an artificial person, it belongs to a class as to which a different rule of liability may be made than that applying to natural persons, it has admitted its case away.

The fallacy of this position is apparent when it is remembered that under all the decisions of this court the amending statute is taken as a part of the charter and of the charter law when the corporation is created, wherever the reservation of the power to amend exists. If it was provided by the law under which this corporation is admitted to do business in Arkansas, that it should have all the provileges and immunities and be subject to no greater

burdens that natural persons, and if, in addition to such a provision, the right of repeal or alteration was not reserved, then there would be merit in the complaint that the Fourteenth Amendment is violated; but no such state of facts or law is before the court. The claim in this case is not even a respectable attempt to press "the broad words of the Fourteenth Amendment to drily logical extreme.' (*Noble State Bank* v. *Haskell*).

In the case of *Berea College* v. *Kentucky*, 211 U. S. 45, the point was made that the State's exercise of the reserve power to amend corporate charters resulted in an inequality as between the corporation and natural persons, and thus violated the Constitution of the United States. The court said:

"The decision by a State court of the extent and limitations of the powers conferred by the State upon one of its own corporations is of a purely local nature. In creating a corporation, a State may withhold powers which may be exercised by and cannot be denied to an individual. It is under no obligations to treat both alike. In granting corporate powers, the Legislature may deem that the best interests of the State would be subserved by some restriction, and the corporation may not plead that, in spite of the restriction, it has more or greater powers because the citizen has. 'The granting of such right or privilege (the right or privilege to be a corporation) rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its Legislature may judge most befitting to its interests and policy (citing authorities).' The act of 1904 forbids 'any person, corporation or association of persons to maintain or operate any college, etc.' Such a statute may conflict with the Federal Constitution in denying to individuals powers which they may rightfully exercise, and yet at the same time be valid as to a corporation created by the State. * * * It is un-

doubtedly true that the reserve power to alter or amend is subject to some limitations, and that, under the guise of an amendment, a new contract may not always be enforceable upon the corporation or the stockholders. But it is settled 'that a power reserved to the Legislature to alter, amend or repeal a charter authorizes it to make any alterations or amendment to a charter granted subject to it which will not defeat or substantially impair the object of the grant, and which the Legislature may deem necessary to secure either that object or any public right. *Inland Fisheries* v. *Holyoke Water Power Co.*, 104 Mass. 446; *Holyoke Water Power Co.* v. *Leyman*, 15 Wall. 500, 522.' *Close* v. *Greenwood Cemetery*, 107 U. S. 466."

The case of *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, involves on certain points the right of the State of Arkansas to exercise its reserve power as to corporations. This court, speaking through Mr. Justice White, said on this point:

"Although it be conceded that the provisions of the statute cannot, consistently with constitutional limitations be applied to individuals, such concession would not cause the act to amount to a denial of the equal protection of the laws. The difference between the extent of the power which the State may exert over the doing of business within the State by an individual, and that which it can exercise as to corporations, furnishes a distinction authorizing a classification between the two. * * * The chartered right to do a particular business did not operate to deprive the State of its lawful police authority, and therefore the franchise to do the business was inherently qualified by the duty to execute the charter powers conformably to such police regulations as might thereafter be adopted in the interest of the public welfare. Besides, it is not disputed that the State, under its Constitution, had a reserve power to repeal, alter and amend charters by it granted, and therefore, even if the impossible assumption was indulged that the grant of the power to do business implied, in the absence of such reservation, the right to carry on the business in violation of a lawfully regulating statute, the existence of the reserve

power leaves no semblance of ground for the proposition. The claim of an irrepealable contract cannot be predicated upon a contract which is repealable. *Citizens Savings Bank* v. *Owensboro*, 173 U. S. 644. And no support for the contrary view arises because the Constitution of Arkansas exacted that the authority to repeal, alter and amend should be exercised 'in such manner, however, that no injustice be done to incorporators.' The determination whether the power to repeal, alter or amend was exerted in such manner as to be unjust to incorporators, was within the province of the State court to finally decide, unless that power was exerted in such an arbitrary manner as, irrespective of the contract clause, to deprive of some other and fundamental right which was within the protection of the Constitution of the United States."

The position taken by the plaintiff in error seems to be that, once having been placed upon an equality with natural persons as to its liability to employees for negligence, it cannot be displaced without a denial of the equal protection of the law. This argument overlooks an element of the organic law of the corporation's creation, which is, that the same power that gave it being may recall its lease of life, or restrict the same at pleasure. It is said in the case of *Sperry & Hutchinson Co.* v. *Rhoades*, 220 U. S. 502:

"The Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between rights of an earlier and later time."

But the plaintiff in error contends the act is unlawful in that it makes a discrimination as between corporations and natural persons when there is no fair reason for such discrimination. We do not concede that there is no fair reason for the discrimination, and at another point we will

endeavor to show that corporations are properly the subject of special classification with regard to rules of liability to employees; but at this point we contend that the exercise of legislative discretion under the power to amend is not subject to question, and may be arbitrarily used in such an instance as this, as will be shown by the following excerpts from opinions of this court on the subject.

"The Legislature has the discretion vested in it ordinarily to determine when an act is necessary in the exercise of the reserved and police powers. The Legislature is conclusively presumed to have made a thorough investigation as to the necessity of each statutory amendment." *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 17.

"The Legislature, provided it acts within its contsitutional authority, is the *arbiter* of the public policy of the State. While the court, unaided by Legislative declaration, and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in acordance with the organic law. If the Legislature had the power to incorporate a similar provision in the statute when it was passed originally, it had the same power with regard to future transactions to enact the amendment * * * The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative consideration in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired results, whether, in short, the legislative discretion, within its prescribed limits, should be exercised in a particular manner, are questions for the judgment of the Legislature, and the earnest conflict of serious opinions does not suffice to bring them within the range of judicial cognizance." *C., B. & Q. R. Co.* v. *McGuire,* 219 U. S. 565.

In *Shields* v. *Ohio*, 95 U. S. 324, it was said:

"It is urged that the franchise here in question was property held by vested right, and that its sanctity as such could not be thus invaded. The answer is, *concensus facit jus*—it was according to the agreement of the parties. The company took the franchise, subject to the power of alteration or repeal by the General Assembly. There is, therefore, no ground for just complaint against the State."

And in the same case, in referring to the relative or comparative rights of corporations and natural persons, the court said:

"There is a material difference between such an artificial creation and a natural person. The latter can do anything not forbidden by law. The former can do only what is authorized by its charter."

In *Hamilton Gas Light & Coke Co.* v. *City of Hamilton*, 146 U. S. 258, 270, 271, this court said:

"In *Greenwood* v. *Union Freight R. Co.*, 105 U. S. 13, 17, the question was as to the scope and effect of a clause in a general statute of Massachusetts providing that every act of incorporation passed after a named day 'shall be subject to amendment, alteration or repeal at the pleasure of the Legislature.' This court, referring to that clause, said: 'Such an act may be amended. That is, it may be changed by additions to its terms, or by qualifications of the same. It may be altered by the same power and it may be repealed. What is it may be repealed? It is the act of incorporation. It is this organic law on which the existence of the corporation depends that may be repealed, so that it shall cease to be a law. Or the Legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the Legislature. That body need give no reasons for its action in the matter. The validity of such action does not depend on a necessity for it, or on the soundness of the reasons which prompted it.' The words, 'At the pleasure of the Legislature,' are not in the

clauses of the Constitution of Ohio or in the statutes to which we have referred. But the general reservation of the power to alter, revoke or repeal a grant of special privileges necessarily implies that the power may be exerted at the pleasure of the Legislature."

In the case of *N. Y. & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, the court, in considering the power of the Legislature of Connecticut to pass an act requiring railway corporations to abolish grade crossings and bear the expense thereof, said:

"The Supreme Court of Connecticut justifies this taking of the plaintiff's property by the following reasons: 'This statute is, in its operation, an amendment to the charter of each of the railroad corporations affected by it. It imposes on the plaintiff, being a corporation of that kind, an obligation which, previous to its passage, the charter of the plaintiff did not impose; but as that charter contains the provision that it might be altered at pleasure by the Legislature, the statute is binding upon it."

And, continuing, this court approved of such holding by the Connecticut court.

As foreign corporations are admitted to do business in Arkansas with the same rights and liabilities of domestic corporations, this act applies alike to all corporations, and therefore is not discriminatory so as to deny the equal protection of the law to plaintiff in error, all who are in plaintiff in error's class being affected alike.

THE ADOPTION OF THE ACT IS A LEGITIMATE EXERCISE OF THE RIGHT OF CLASSIFICATION OF CORPORATIONS AS ARTIFICIAL PERSONS, SUBJECT TO SPECIAL RULES, INDEPEDENTLY OF THE RESERVE POWER TO AMEND CHARTERS.

We do not think that it is necessary to save the statute that we should take such a position as is stated in the proposition above, but we do so in reply to a great deal that has been said in plaintiff in error's brief. This court, of course, will accept the construction put upon the law by the State court (*Tullis* v. *Lake Erie, etc., R. Co.*, 175 U. S. 348; *Northern Cent. R. Co.* v. *Maryland*, 187 U. S. 261). But, in reply to plaintiff's argument, and because the authorities we cite under this heading have a broad bearing on the whole question, we contend that there is a fair reason for the statute that does not require with equal force its extension to others whom it leaves untouched—that is, natural persons—who are employers in occupations or businesses other than those included in the act. In countless cases this court has admitted and upheld the power of the states to classify corporations for the purpose of imposing upon such corporations or classes of corporations the burden of special laws and rules of liability. Frequently the court has said that corporations whose employees are exposed to special hazards may be subjected to liability for the negligence of fellow servants.

Mo. Pac. Ry. Co. v. *Mackey*, 127 U. S. 205.

Minneapolis Ry. Co. v. *Herrick*, 127 U. S. 211.

Chicago, etc., Ry. Co. v. *Pontius*, 157 U. S. 210.

Tullis v. *Lake Erie, etc., Ry. Co.*, 175 U. S. 351.

Minnesota Iron Co. v. *Kline*, 199 U. S. 590.

Wilmington Star Mining Co. v. *Fulton*, 205 U. S. 60.

And as to an act of Congress:

El Paso, etc., Ry. Co. v. *Guiterrez*, 215 U. S. 87.

L. & N. Ry. Co. v. Melton, 218 U. S. 36 (in which case the right is extended to include those servants not exposed to the special hazard).

Railway v. *Turnipseed*, 219 U. S. 35.

We do not know of a case in which the court has been called to pass upon an act extending the rule to all corporations, whether their employees are subjected to special hazards or not; but it is quite reasonable to say that at this period in this industrial age all corporations may reasonably be so classified; because,

(1) Almost all manufacturing, mining, transportation, constructing and building, and such business and commerce as involves the operation or control of dangerous or hazardous agencies, such as elevators, electric currents, water power, gas plants and pipe lines, and like things and substances of infinite variety, is controlled or conducted by incorporated companies. The exceptions to this rule are

negligible; it might fairly be said that the exceptions are incidental.

(2) The fact that this is so—that is, that such incorporation is resorted to—is due largely to the effort of individuals to escape personal liability and responsibility, and place the same in the incorporated person, who can be called upon to pay in damages no more in money than the value of its property or the capital with which its human incorporators have started it in business. The measure of its responsibility in dollars and cents is fixed by its incorporators, and may be much less than the possible or probable measure of its liability. This being so, the conduct of such artificial persons towards employees with respect to the care used in employing fellow-servants will differ from that of individuals and in less degree; and a rule fixing corporate responsibility for the acts of the agent may be justified both by the inherent difference in responsibility as well as disposition.

(3) In the fact that all acts of a corporation are done in reality by agents, employees and servants; that the individuals who control the aggregation of capital most frequently do not participate in the actual direction of its affairs, do not know the employees and their merits and needs, and are not so apt to be generous, careful or merciful as if they were individual employers. An individual master whose servant is injured, is, in theory, of humane instincts, and may waive the benefit of the fellow-servant doctrine, and, doing so, aid, assist or endow the injured

employee or his helpless survivors; while the incorporated employer is soulless and heartless, and exists for profit alone, and is without humane instincts or impulses, and persistently and constantly litigates the demands of injured employees and pleads the defense of common employment whenever a shadow of such defense appears.

The above has rather a stump-speech sound, but we do not intend it as such, but offer it as an argument that there are real, and not fanciful, considerations for the rule, although no such burden is placed upon us. Rather, it is upon the plaintiff to show that the distinction made by the Legislature is in fact without a difference.

Williams v. *Arkansas*, 217 U. S. 79, 90.

While the Fourteenth Amendment contemplates corporations in its assurance to "persons" of the equal protection of the laws, this fact does not, as counsel argue, mean that artificial persons are by law to be treated in all respects the same as natural persons. Such an end would deny the right of classification. The organic difference in the being of the two classes of persons—natural and artificial—is such a difference, and suggests and leads to such distinctions as to demand rather than to deny the exercise of the power of classification. The privileges of the two classes of persons, corporate and natural, may never be identical, in the very nature and philosophy of things. The immunities of the two classes will always differ. No court has ever held that the same law must govern the two kinds of persons merely because corporations are persons within the equality

clause. The equality clause admits of classification, which in this instance is founded upon the generic difference between artificial and natural persons. It would be otherwise if the difference were but specific, as between white and black men, for instance.

In *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, it is said, quoting from *Home Ins. Co.* v. *New York,* 134 U. S. 594:

"Nor does the amendment (referring to the Fourteenth Amendment) prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates or the object sought to be attained by it; and when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions in respect to the privileges conferred upon them and the liabilities to which they are subjected."

The mere fact that legislation is special, and made to apply to certain persons and not to others, does not affect its validity if it be so made that all persons subject to its terms are treated alike under like circumstances and conditions.

C. B. & Q. Ry. Co. v. *McGuire,* 219 U. S. 555.

As said by Mr. Justice Holmes, in the case of *Standard Oil Co.* v. *Tennessee,* 217 U. S. 413:

"There are many attempts to construe the Fourteenth Amendment as introducing a factitious equality, without regard to practical differences that are best met by corresponding differences of treatment. The law of Tennessee sees fit to seek to prevent a certain kind of conduct. To prevent it, the threat of fine and imprisonment is likely

to be efficient for men, while the latter is impossible and the former less serious to corporations. On the other hand, the threat of extinction or ouster is not monstrous and yet is likely to achieve the result with corporations, while it would be extravagant as applied to men. Hence, this difference is admitted to be justifiable."

In *Lindsey* v. *Carbonic Gas Co.*, 220 U. S. —, the rules by which the validity of classification is to be tested are succinctly and lucidly stated, as follows:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these:

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.

"2. A classification having some reasonable basis, does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.

"3. When the classification in such a law is called in question, if any state of facts can be reasonably conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

"4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Citing—

Bachtell v. *Wilson*, 204 U. S. 36.

L. & N. R. Co. v. *Melton*, 218 U. S. 36.

Ozan Lumber Co. v. *Union County Nat. Bank*, 207 U. S. 251.

Munn v. *Illinois*, 94 U. S. 113.

Henderson Bridge Co. v. *Henderson*, 173 U. S. 592.

And at another point in the case, the court said:

"* * * Plainly a police law may be confined to the occasion for its existence; as is said in *Carroll* v. *Ins. Co.*, 199 U. S. 401: 'If an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms.'"

And in the case of *Flint* v. *Stone Tracy Co.*, 220 U. S. ——, the court, in pointing out reasons which might justify the Federal corporation tax law as proper classification, the same excise tax not being laid upon individuals engaged in the same occupation, said:

"The tax is laid upon the privileges which exist in conducting the business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution; the transfer of property interests by the disposition of shares of stock; the advantages of business controlled and managed by corporate directors; the general absence of individual liability; these, and other things, inhere in advantages of business thus conducted which do not exist in the same business if conducted by private individuals or pantreships."

If the above enumerated advantages justify a discrimination in taxing corporations, we cannot see why they would not also justify the restriction of the immunity from liability which is accomplished by the act of the Arkansas Legislature in question here.

As was said by Mr. Justice Brewer, in the case of *Atchison, Topeka & Santa Fe R. Co.* v. *Matthews*, 174 U. S. 104:

"Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality. * * * It is the very essence of classification that upon the class are cast duties and burdens different from those resting upon the general public."

And in the case of *M., K. & T. R. Co.* v. *May*, 194 U. S. 267, the court said, in holding valid a statute of the State of Texas requiring railway corporations alone to suppress the growth of Johnson grass on their property:

"With regard to the manner in which such a question should be approached, it is obvious that the Legislature is the only judge of the policy of a proposed discrimination. The principle is similar to that which is established with regard to a decision of Congress that certain means are necessary and proper to carry out one of its express powers. * * * When a State Legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."

It would extend this brief to unwarrantable and useless length to refer further to the long line of decisions of this court to the same general effect as the authorities above quoted.

THE HAZARD INCURRED BY THE DEFENDANT IN ERROR WAS A RISK OF RAILROADING AS TO WHICH THE LEGISLATURE MIGHT MAKE A SPECIAL RULE.

The act of the Legislature in question provides that all railroad companies, whether incorporated or not, shall respond for the negligence of co-employees (see Acts of Arkansas, 1907, p. 102).

It was alleged in the complaint that the defendant was operating a railway (Tr. p. 1). The defendant denied this, but admitted that it was operating a "tramway," a distinction found to be without a difference, because it appeared that the thing operated was a narrow-guage railway, with steam locomotive, and 80-odd cars, of a capacity of two tons each. See the opinion of the Supreme Court of Arkansas (Tr. p. 135), in which it is said:

> "The Aluminum Company of America is engaged in the mining of bauxite in Saline County, Arkansas, and in connection with its plant operates a narrow-guage railroad with a trackage of two miles, which is used for the purpose of hauling the ore from the mines to the drying shed. The equipment of the road consisted of one locomotive and about eighty tram cars. The roadbed was new and the track in good shape at the time the accident in question happened."

And on transcript, pages 65, 67, it is shown that the capacity of these cars is about four thousand pounds each.

This would seem to be a railroad, "whether incorporated or not," and as it is conceded that the defendant in error was caught between the engine and the cars and

crushed, while in the performance of duty, it must be conceded that he was subjected to a hazard of railroading.

The plaintiff in error sought to get rid of this theory of the case by asking an instruction at the trial below declaring that the defendant was not a railway company within the meaning of the act (Tr. 127), and that the defendant was not a "railroad operating within this State, whether incorporated or not," "within the meaning of the term as used in the act of the Legislature of 1907." These instructions were designated by the defendant below as Nos. 26 and 29, and were refused by the trial court; and on appeal to the Supreme Court of Arkansas the defendant below claimed error on account of such refusal (Tr. 130). The Supreme Court said:

"Instructions Nos. 26 to 36 inclusive pass out of the case;" and, while it appears that the Supreme Court held the defendant liable on the broad proposition that it was a corporation, it may be—in fact, it must be—that the court regarded it also as a railroad company, whether incorporated or not, and therefore subject to a special rule of liability made to fit a special hazard. Counsel for plaintiff in error seem to contend that the employees of the aluminum company who work on its railroad are not subject to railroad hazards because the corporation is not a common carrier and its railroad is a narrow-guaged affair. This contention is disposed of by this court in the case of *Minnesota Iron Co.* v. *Kline*, 205 U. S. 537, where the question was raised and the court said as to the facts:

"The track on which the accident happened was a narrow-guaged track, on which dump cars were run by the defendant, a mining company, for the purpose of stripping the earth from the surface of the mines."

And of the law, the court said:

"Of course there is no objection to legislation being confined to a peculiar and well-defined class of perils; and it is not necessary that they should be perils which are shared by the public if they concern the body of citizens engaged in the particular work."

And in concluding the opinion it was said the appeal was "merely one of the many attempts to impart an over-mathematical nicety to the prohibitions of the Fourteenth Amendment," which seems to us to aptly fit the assignment of error in this case.

Plaintiff in error attempts to argue that no such view could be taken of the act and that it could not be so construed by the Supreme Court of Arkansas because it is not separable in its provisions. We believe that no such question as the separableness of the act is before this court; but if it is here, there is a perfect answer in what is said as to construction and separable provisions in the case of *Berea College* v. *Kentucky*, *supra*.

THERE IS NO FEDERAL QUESTION INVOLVED, AND THIS CAUSE SHOULD BE AFFIRMED OR DISMISSED UNDER RULE 6.

On this point we call attention to our brief heretofore filed at the October term, 1909, on separate motion for dismissal or affirmance under rule 6. And we call attention to the fact that it does not appear in the record, and is not admitted here, that the plaintiff in error was a corporation doing business in Arkansas at the time of the adoption of

the act of 1907, and, for all that this court may know, it entered the State of Arkansas after the adoption of such act and necessarily assented thereto.

Plaintiff in error contends that there is a sufficient inference or implication from statements that do appear in the record to show that the corporation was within the State at the time of the adoption of the act. Of course the burden is upon the plaintiff in error to make such a showing, and in our judgment the inference or implication is not strong enough to support the jurisdiction of this court, and entitle the plaintiff in error to complain of the act.

Respectfully submitted,

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ALUMINUM COMPANY OF AMERICA *v.* RAMSEY.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 56. Submitted November 8, 1911.—Decided December 11, 1911.

Although a statute increasing the liability of corporations may, as to corporations of the State, be an exercise of the reserved power to alter, amend and repeal, the application of that principle as to foreign corporations depends on many considerations and involves Federal questions.

Whether or not a classification merely between all corporations and partnerships and individuals offends the equal protection clause, a classification of corporations operating railroads and individuals does not offend that provision of the Constitution.

One within a distinct class which is properly subject to classification cannot question the constitutionality of the classification on the

ground that it is too broad and includes others outside of that class.

Although the state court may have applied the statute to plaintiff in error merely as a corporation, if the record shows that it is a corporation of a kind properly classified by the statute and there is equality within that class, the statute will not be held invalid as repugnant to the equal protection clause of the Constitution.

89 Arkansas, 522, affirmed.

THE facts, which involve the constitutionality, under the Fourteenth Amendment, of the Arkansas Fellow Servant Law, are stated in the opinion.

Mr. U. M. Rose, Mr. G. B. Rose, Mr. W. E. Hemingway and *Mr. J. F. Loughborough* for plaintiff in error:

The act of 1907 is unconstitutional because it denies to plaintiff in error the equal protection of the law and deprives it of its property without due process of law.

It imposes obligations upon corporations without regard to the class of business in which they are engaged and in a matter where the classification of corporations is not authorized because of the nature of their entity.

Corporations are persons within the Fourteenth Amendment and are entitled to all of its protections. *Gulf, Colorado & Sante Fe Ry.* v. *Ellis*, 165 U. S. 154; *Santa Clara County* v. *Southern Pacific Ry.*, 118 U. S. 394; *Minneapolis Ry. Co.* v. *Beckwith*, 129 U. S. 29; *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 709; *Missouri* v. *Lewis*, 101 U. S. 30; *Hays* v. *Missouri*, 120 U. S. 68; *Duncan* v. *Missouri*, 152 U. S. 377; *Lowe* v. *Kansas*, 163 U. S. 88.

See also the following: *N. Y. &c. Ry.* v. *New York*, 165 U. S. 633; *Cargill Co.* v. *Minnesota*, 180 U. S. 469; *Chicago &c. R. R. Co.* v. *Pontius*, 157 U. S. 211; *Atchison, T. & S. F. Ry.* v. *Matthews*, 174 U. S. 96; *St. L. & S. F. Ry. Co.* v. *Matthews*, 165 U. S. 1; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618; *Southern Ry. Co.* v. *Green*, 216 U. S. 400,

412; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 112; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Mr. Henry M. Armistead and *Mr. T. M. Mehaffy*, with whom *Mr. J. E. Williams* was on the brief, for defendant in error:

The act of the legislature of Arkansas, adopted in 1907, is constitutional under the power reserved in the Arkansas constitution of 1874, to alter or amend corporate charters. *Greenwood* v. *Union Freight R. Co.*, 105 U. S. 13; *St. L., I. M. & S. Ry. Co.* v. *Paul*, 173 U. S. 404; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *Northern Cent. R. Co.* v. *Maryland*, 187 U. S. 258; *N. Y. & N. S. R. Co.* v. *Bristol*, 151 U. S. 567; *Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S. 205, approved in *Orient Ins. Co.* v. *Daggs*, 172 U. S. 45; *Berea College* v. *Kentucky*, 211 U. S. 45; *Holyoke Water Power Co.* v. *Lyman*, 15 Wall. 500; *Close* v. *Glenwood Cemetery*, 107 U. S. 466; *Sperry & Hutchinson Co.* v. *Rhoades*, 220 U. S. 502; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 17; *C., B. & Q. R. Co.* v. *McQuire*, 219 U. S. 565; *Shields* v. *Ohio*, 95 U. S. 324; *Gas Light Co.* v. *Hamilton*, 146 U. S. 258.

The adoption of the act is a legitimate exercise of the right of classification of corporations as artificial persons, subject to special rules, independently of the reserved power to amend charters. *Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S. 205; *Minneapolis Railway* v. *Herrick*, 127 U. S. 211; *Chicago &c. Ry. Co.* v. *Pontius*, 157 U. S. 210; *Tulis* v. *Lake Erie &c. Ry. Co.*, 175 U. S. 351; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593; *Wilmington Star Mining Co.* v. *Fulton*, 205 U. S. 60; *El Paso &c. Ry. Co.* v. *Guiterrez*, 215 U. S. 87; *L. & N. Ry. Co.* v. *Melton*, 218 U. S. 36; *Railway* v. *Turnipseed*, 219 U. S. 35; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; *C., B. & Q. Ry. Co.* v. *McGuire*, 219 U. S. 555; *Standard Oil Co.* v. *Tennessee*, 217 U. S. 413; *Lindsey* v. *Carbonic Gas Co.*, 220 U. S. 61; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107; *A., T. & S. F. R. Co.* v. *Matthews*,

174 U. S. 104; *M., K. & T. Ry. Co.* v. *May*, 194 U. S. 267.

The hazard incurred by the defendant in error was a risk of railroading as to which the legislature might make a special rule. *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The defendant in error brought this action against the plaintiff in error in the Saline Circuit Court of the State of Arkansas to recover for personal injuries alleged to have been received by him while in the employment of the company, which maintained a railroad to its mines, on account of the negligence of a fellow servant.

The action was based upon a statute of the State called by the parties "The Fellow Servant Law." (Acts 1907, Act 69, p. 162.) The statute makes railroad corporations operating within the State and every company, whether incorporated or not, engaged in the mining of coal, "liable to respond in damages for injuries or death sustained" by agents, employés or servants, "resulting from the careless omission of duty or negligence of such employer," or "any other agent, servant or employé of the said employer," in the same manner as though the carelessness, omission of duty or negligence was that of the employer.

The company assailed the constitutionality of the statute by the request for the following instruction, which was refused by the trial court: "You are instructed that the act of the legislature, approved March 8th, 1907, known as 'The Fellow Servant Law,' in providing it shall apply to all corporations but shall not apply to individuals, persons or partnerships, except those engaged in the operation of a railroad or coal mine, denies to this defendant the equal protection of the law, and is in violation of the Fourteenth Amendment to the Constitution of the United States."

There was a verdict for the plaintiff, defendant in error here, upon which judgment was duly entered. It was sustained by the Supreme Court of Arkansas. 89 Arkansas, 522.

The Supreme Court sustained the action of the trial court in refusing the instruction on the authority of *Ozan Lumber Co.* v. *Biddie*, which had been previously decided, and which is reported in 87 Arkansas, 587. This action of the court is assigned as error, and is the Federal question relied on.

A motion is made to dismiss, and, alternately, to affirm, respectively, on the ground that there is no Federal question in the state court's construction of the statute, and that if there be such a question it is foreclosed by repeated decisions of this court. In support of the motion to dismiss it is contended that the state court decided that the act assailed is an amendment to the charter of the corporation under the reserved right to amend, alter or repeal the charter, and of this the corporation cannot complain, the exertion of such right being a condition of its existence.

In *Ozan Lumber Co.* v. *Biddie, supra*, the court decided that "The Fellow Servant Law" was an amendment to the charters of corporations, made under the right reserved in the constitution of the State to repeal, alter or amend such charters. The Ozan Lumber Company, however, was a domestic corporation, and whether the principle of the decision would be applicable to foreign corporations, as plaintiff in error in the case at bar is, being a Pennsylvania corporation, depends on many considerations, and involves questions not local; so we pass to the consideration of the merits.

On the merits the case is in a very narrow compass and does not demand much discussion, though plaintiff in error earnestly presses the contention that the statute is discriminatory in that it applies to all corporations, but does not apply to individuals or partnerships. Whether

that exact distinction, that is, the distinction merely between corporations and partnerships and individuals, is competent for a legislature to make, under its power of classifying objects, we are not called upon to decide. The distinction made by the statute is broader. The distinction (among others) it makes is between railroads operating in the State and individuals, and such distinction has been maintained by this court as not offending the Constitution of the United States. *Tullis* v. *Lake Erie & Western R. R. Co.*, 175 U. S. 348; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593. See also *Employers' Liability Cases*, 207 U. S. 463, 504, and *El Paso &c. Ry. Co.* v. *Gutierrez*, 215 U. S. 87.

What grievance plaintiff in error might have if it were not operating a railroad we are not called upon to consider, because it is limited in its complaint to the effect of the statute on it and cannot appropriate the grievance that corporations engaged in mining, but not operating railroads, may have on account of the distinction made between them and individuals.

It is true that the Supreme Court of the State, following *Ozan Lumber Co.* v. *Biddie*, *supra*, decided the law was a regulation of corporations, and applied it to the plaintiff in error because it was a corporation, not distinguishing it as one operating a railroad. It, however, may be so distinguished under the statute. That is, the statute constitutes a class of corporations operating railroads, and under the cases we have cited the classification is valid, there being equality within the class. In other words, not only the plaintiff in error, but all other corporations operating railroads are covered by the statute.

We think, therefore, that the statute of Arkansas is not repugnant to the Fourteenth Amendment, and the judgment is

Affirmed.